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No. 09-1310

Supreme Court, U.S.
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In the

Supreme Court of the United States

JILL LINDSAY, *et al.*,

Petitioners,

– v. –

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, a business entity of unknown type, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents don't dispute many of the Petition's points. They don't dispute "*Garmon*'s" inapplicability to the Railway Labor context. (They claim the Second Circuit applied "DFR preemption.") They don't dispute that when courts imply causes of action, they must satisfy Article III standing requirements. (They pretend those without Article III standing have it, and those who have it, don't.) They don't dispute the Second Circuit's use of "DFR law" (a 1944-vintage federal common law doctrine) to eclipse statutory rights created in 1926. (*I.e*, they don't dispute Petitioners' "hybridization" and "overhybridization" theses. Pet-22-24.) Finally, they don't dispute the Second Circuit's Opinion

- leaves unionized employees with only one basic labor right and one cause of action — a DFR claim against their union;
- permits a union — in the name of "majority rule" — not simply to negotiate a prospective agreement, but waive vested rights; and
- permits unions to often claim sole right to represent members, non-members, retirees and ex-employees in court.

Because the Second Circuit ignored significant differences between the NLRA and RLA and ruled on grounds applicable to both, its decision impacts all sectors. Because the decision contradicts this Court's precedents, several statutes, and supplants state law, and Circuits are divided on three issues, certiorari is required. The arguments Respondents do make don't justify allowing important statutory and constitutional questions to go unexamined and deep-rooted Circuit-splits to go unresolved.

Setting The Record Straight:

The Claims: Respondents pretend that, rather than Petitioners' RLA and state claims, DFR claims were always at the heart of their case. The opposite is true.

Respondents pretend that, because Petitioners' claims share a common nucleus of operative facts, they are "identical". In fact, their statutory claims implicate "bargaining conduct" and "negotiations;" their state-law claims do not. They concern post-negotiation conduct and ratification balloting, neither "central to" nor at the Act's "core." (Pet-32).

Finally, in an effort to alter the Article III standing calculus, Respondents pretend Petitioners only seek the RPA's invalidation and not damages.

The Act: Respondents treat the Company and Union as contractual "parties."[1]

But, "carriers" and "employees" are the "parties" under the Act.[2] A "labor organization" is merely a "representative." 45 U.S.C. §151 Sixth. There are three problems with Respondents' conceit that APFA is a "party:" First, calling it one does not make it one within the plain meaning of the statute. Second,

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[1] Opp/U-26 ("APFA ...[is] the other party to the bargaining relationship;" Opp/U-13 (characterizing the RPA as "a CBA regulated by ... the RLA" between the "parties (APFA and American)."

[2] RLA §§155, 156 and 152-Seventh expressly refer to **the "carrier"** and **"its employees"** as the **"parties"** to **agreements "covering rates of pay, rules, or working conditions,"** and as the **"parties interested in intended changes"** to such **agreements**.

even assuming it had standing to seek declaratory or injunctive relief, that standing would not be exclusive. Third, only the employees here have standing to seek damages. *Cf. UFCW v. Brown Group*, 517 U.S. 544 (1996).

I. WHY CERTIORARI SHOULD BE GRANTED ON THE STANDING ISSUE.

A. The Decision Wreaks Havoc with Article III Principles And Statutory Text.

Respondents miss one of Petitioners' principal points: that where the statute does not specify, Article III is the touchstone for deciding in whose favor a cause of action should be "implied." In some instances, it will be the union;[3] in others, employees; in many, both. As always under Article III, it depends upon who has suffered the injury.

Respondents assert that the union is the only party ever entitled to assert a claim under 152 Seventh or First. Neither of their grounds for so asserting is tenable.

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[3] Where a carrier has refused to bargain, a union can usually seek a bargaining order under 152 Ninth and/or Seventh. In such cases — *e.g.*, many cited at Opp/Co-18-n.11 and Opp/U-28-29-n.22 — the union has itself suffered an injury. Here, however, no bargaining order was sought because plaintiffs are not the bargaining agent. The focus of Petitioners' RLA claims has always been: restoring employees' wages and benefits. As they alone suffered that injury, they alone have standing.

1. The Union's Status As Exclusive Bargaining Agent Neither Confers Article III Standing Nor The Right To Control Employees' Claims.

This Court already rejected the Second Circuit's and Respondents' core thesis. *See* Pet-17, discussing *Elgin v. Burley* (the fact that a union "occupie[s] the position of collective bargaining agent" does not necessarily mean it also has authority "to settle" or "represent" employees on claims). Congress has as well. 29 U.S.C. §411(a)(4)(union members' right to sue enshrined in LMRDA Bill of Rights).

Even had they not, under the facts presented here, the Union could not satisfy the "irreducible constitutional minimum" of Article III standing.[4]

2. The Panel Misread The Status Quo Provisions

When Congress creates a private right of action, but leaves it to the courts to define its contours, their mission is:

> "not to assess the relative merits of ... competing rules, but rather to attempt to infer how the ... [enacting] Congress would have addressed the issue had ... [it] included ... an express provision [for a private right of action] in the ... Act.

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[4] Because the injury §152 Seventh protects against is a diminution in pay and benefits, it cannot claim to have been injured. It cannot satisfy the "causation" requirement because it participated in the violations. And, it cannot satisfy the redressability requirement since any recovery belongs to the employees.

Musick, Peeler & Garrett v. Employers' Insurance, 508 U.S. 286, 294 (1993) (material in brackets added). Rather than conduct that inquiry (which would have been informed by cases such as *Texas & Pacific Rwy. v. Rigsby*, 241 U.S. 33 (1916)), the Panel decided this case in accordance with its own sensibilities and policy preferences (for a concept of "majority rule" that is all-pervasive, PetApp-10a-16a, and in favor of "hybridization" and "super-hybridization," Pet-22-24, PetApp-9a-14a-24a-25a). It then achieved these objectives by subordinating *Cort's* first factor to its second and third. (PetApp-11a-12a-15a). In the process, it interpreted a statute intended to protect employees as only protecting their union. (PetApp-9a).

B. The Assertion Circuits Are Not Divided On Employee Standing Is Mistaken

At Pet-13-14, Petitioners discuss seven Circuit cases which, either explicitly or implicitly, recognize employee standing to sue for violations of the RLA's status quo. Respondents assert "[n]one of the cases ... apply to Section 2 First or Seventh," and there is "no judicial support" for implying rights of action in employees' favor. (Opp/Co-15; Opp/U-28-24). They also claim each case was "*brought by the union* ..., rather than individual employees." (Opp/Co/17-18). Review of those seven cases proves them wrong.

The cases fall into two categories: cases in which employees were awarded relief under an at-issue status-quo provision, or in which employees' standing was implicitly recognized.

1. Circuits in Which Employees Sued And Were Awarded Relief

The Fifth, Sixth and Eighth Circuits have explicitly acknowledged employees' standing or affirmed rulings in their favor.

Dwellingham v. Thompson, 91 F.Supp. 787 (E.D.Mo. 1950), *aff'd sub nom*, *Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir. 1952), concerned a jurisdictional dispute between waiters and stewards, each of whom had a different bargaining agent and CBA. As part of settling a strike, certain issues were submitted to an Adjustment Board.

After the Board awarded disputed positions to the stewards, their union demanded the waiters be discharged. When the Railroad complied, six waiters (not their union) sued under 152 Seventh on behalf of a class "for a preliminary and permanent injunction restraining any action pursuant to the award and restoring plaintiffs to the disputed jobs, and for damages." 91 F.Supp. at 791. They sued the carrier and [stewards'] union.

The District Court ruled the "removal of plaintiffs from their jobs constitute[d] a change in 'working conditions' within the meaning of [RLA] Section 2, Seventh of the Act," *id.* at 795, entitling plaintiffs to prior Section 6 notice. The Union appealed, arguing that the Railroad's discharge of the waiters did not violate status-quo obligations.

The Eighth Circuit affirmed, noting "[w]hen the ... [discharge] was found to be wrongful and violative of the provisions of the Act, it was the duty of the court,

and it properly acted, to restore the plaintiffs to their position." 251 F.2d at 287.

B.R.T. v. Smith, 251 F.2d 282 (6th Cir. 1958), involved employees with "dual" job status as conductors and trainmen. As trainmen, they were members of the trainmen's union (BRT), covered by a BRT-negotiated CBA, and subject to a "union shop" provision. As conductors, they were members of the conductors' union (ORC) and an open shop.

When they paid their dues to ORC, but not BRT, BRT demanded the Railroad discharge the men and it complied. One employee filed a class action under 152 Seventh, naming the Railroad and BRT. ORC joined as a plaintiff.

The District Court held the agreement to discharge the employees violated 152 Seventh, and enjoined the Railroad and Union from implementing it. BRT alone appealed, but on grounds implicating the Railroad. The Sixth Circuit affirmed, agreeing "the action contemplated ... by BRT and the Railroad is illegal, ... a valid cause of action is stated and the District Court rightly granted the injunction." 251 F.2d at 287.

Finally, the *Mungin* cases[5] involve successive changes in working conditions by a railway in violation of §§152 Seventh and 156. 416 F.2d at 1172, 1173, n.21. First the Government sued and obtained an injunction. *Id.*, n.16. Then various unions sued for contempt orders. Finally, union members sued for

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[5] *Mungin v. Florida East Coast Rwy*, 416 F.2d 1169 (5th Cir 1969)("Mungin I"); *Mungin v. F.E.C.*, 318 F.Supp. 720 (M.D.Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971)("*Mungin* II").

damages. The District Court dismissed their complaint. On appeal, the Fifth Circuit reversed, noting the case was "new" in only two respects: "the suit was by employees, not by a union, and ... the relief formally prayed for was a money award." *Id.*, 1174. Neither gave it pause. It held, where employees prove their allegations, "the courts may grant suitable relief," *id.*, and such relief could include backpay or damages. (1177).

> "So much would surely have been mandated had this suit been brought by IARE. Is it any different now that it was brought by the members?"

416 F.2d at 1178. The Circuit easily answered no.[6]

2. Circuits In Which Employees Were Implicitly Recognized As Having Standing

Four Circuits have implicitly recognized employees' standing to sue for violations of the status quo.

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[6] Respondents attempt to distinguish *Mungin* on the grounds that "unlike the situation here" (Opp/Un22), there, "the union breached the duty of fair representation." (Opp/Co-18-n11; Opp/U-29-n.22). The DFR allegation is a red herring. The *Mungin I* Court was ***required*** to assume the truthfulness of alleged union wrongdoing because the complaint was dismissed on the pleadings. 416 F.2d at 1172-1175. On remand, the Union intervened and was exonerated. 318 F.Supp. at 731-732 ("IARE ... acted in good faith," *not* in breach of its DFR). The employees were again found to have stated valid claims, a class was certified and settlement approved. The Fifth Circuit summarily affirmed. 441 F.2d 728.

In *R.A.P.A. v. Wings West Airlines*, 915 F.2d 1399 (9th Cir. 1990), an association and pilot sued an airline for altering working conditions before the newly-designated union could commence bargaining. They sought injunctive relief and damages under 152 First. The Association sued "in a representative capacity on behalf of the pilots," 915 F.2d at 1400 n.1 — *not* in its own right — and the pilot sued for a class.

The District Court dismissed the case as presenting a "minor dispute," over which it lacked jurisdiction. The Ninth Circuit held that "jurisdiction exists to enforce section 2, First, ... but that the prerequisites for stating a claim under ... *Chicago & N.W. Ry.* do not exist under the facts of this case." 915 F.2d at 1403. In ruling on the merits of the 152 First claim, the Court implicitly recognized the pilots' standing.

The same is true with respect to each of the three remaining cases — *Carbone*, *Hilbert* and *Kushto*.[7] In each, employees sued their carriers for violating the status quo and, after examining the facts, the courts dismissed the claims as failing to make out "major

[7] *Carbone v. Meserve*, 645 F.2d 96 (1st Cir. 1981); *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881 (7th Cir. 1961); *Kushto v. B.R.A.C.*, 818 F.2d 290 (4th Cir. 1987).

disputes."[8] They held "minor disputes" had to be submitted to an Adjustment Board.[9]

Since determining whether a claim presents a major or minor dispute is a complex, time-consuming and fact-intensive process, it would make absolutely no sense for courts to engage in that process if employees have no standing to be in court in either event. It necessarily follows that the many courts that have made these determinations believe employees *have* standing as to "status quo" claims.

There is thus a 7:2 or 6:3 split on the question among the Circuits. The Second and Third Circuits have held that employees don't have standing to litigate "status quo" claims. The First, Fourth, Fifth, Sixth, Eighth and Ninth Circuits either assume or have held they have standing. The Seventh Circuit has supported both positions.[10]

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[8] In *Carbone*, "spare board members" sued their carrier for altering their working conditions in violation of §6, *see* 645 F.2d at 98-99, by reducing the number of dispatchers. Perhaps misled by the Circuit's convention of collectively referring to plaintiffs as "the union" (*id.*, 97-n.1), Respondents mistakenly characterize the suit as not brought by employees. Plaintiffs included individual spare-board members.

[9] At the time, courts believed they lacked jurisdiction over "minor disputes." It has since become clear they only lack "primary," not "subject matter" jurisdiction.

[10] *Compare Reneissen, supra* (employees not have standing under 152 First) with *Hilbert, supra* (employees assumed to have standing under 156 and 152 Seventh) and *B.M.W.E. v. CSX*, 478 F.3d 814 (7th Cir. 2007)(standing assumed under 152 Seventh; *see* note-1 for reference to employee-parties).

C. The Circuits Are Divided On Whether A Union Can Ever Represent Retirees Or They Alone Have Standing.

Respondents don't dispute the existence of the four-way Circuit-split described at Pet. 20-22 on this question. Rather, they pretend it is irrelevant. (Opp/U-27-n.18). In fact, one-third of Plaintiffs and several thousand putative-class members are retired or former employees, or *ex*-furloughees. (JA-5197-¶53)(Contra Opp/U-27-n.18).

Because the standing issue is clearly presented and the plaintiff group contains both retirees and ex-employees, this case affords the perfect vehicle for resolving this controversy.

II. WHY CERTIORARI SHOULD BE GRANTED ON THE PREEMPTION ISSUE.

A. Respondents Have Tacitly Conceded Petitioners' *Garmon* Arguments.

At Pet-33-34, Petitioners describe the Circuit-split that has proliferated over whether *Norris* or *Garmon* pre-emption applies under the RLA. At Pet-25-36, Petitioners demonstrate why *Garmon* is inapplicable.

Respondents pretend there is no "divergence." What appears to be a "split," they suggest, is nothing more than two compatible doctrines being applied in two different spheres — with "*Norris/Lingle*" only applicable to "minor disputes" (Opp/U-22); and *Garmon*, to "major disputes."

There are two problems. First, saying that "Norris/Lingle" is only relevant to cases involving a minor dispute is like saying the provisions of the

criminal code are only relevant to those who turn out to be guilty. The whole point of the *Norris/Lingle* doctrine is to distinguish those cases in which RLA preemption is warranted from those in which it is not. Second, on its face, the Opinion below clearly rejects any "different spheres" interpretation. (PetApp-19a-20a)(*Garmon* preemption applicable "to major RLA disputes, ... minor RLA disputes, ... and to RLA issues ... not falling squarely within either category").

Knowing the Circuit-split won't disappear, and apparently unable to answer Petitioners' *Sears Roebuck* and *Davis* arguments (Pet-9-11, 27-31, 31-33), Respondents rewrite the "Part C" of the Panel's decision. By focusing on the DFR liability standard and eliminating all but a passing reference to *Garmon*, they transform the decision from a "Garmon" into a "DFR" preemption decision. (*Cf.* PetApp-16a-24a with Opp/U-13-24).

However, the Second Circuit clearly applied *Garmon* to preempt Petitioners' claims and, unless reversed, it is that opinion *as written* that will be applied by courts and guide litigants. In the event, the "DFR Preemption" theory is itself fatally flawed.

B. Respondents' "DFR" Theory Elevates Federal Common Law Over Express Congressional Intent

So enamored are Respondents with the DFR liability standard and the possibility that it can be used as an all-purpose liability shield that they have also made it the centerpiece of their preemption defense.

Their thesis is that permitting employees to enforce rights under their Union Constitution would frustrate DFR law and, therefore, also the RLA. (Opp/U-23-24). The unstated proposition is that DFR law does not so much establish *a basis* for liability, as *an exemption* from it. That is, it exempts unions from any contractual or other liability that does not precisely fit the *O'Neill* mold.

Both Congress and this Court have rejected that position. This Court has made it clear that, in addition to the DFR, which attaches automatically, a union can assume additional obligations "by contract." *U.S.W.A. v. Rawson*, 495 U.S. 362, 373 (1990), *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987). And, Congress resoundingly rejected Respondents' thesis when it passed the Labor-Management Reporting and Disclosure Act. Not only does the statute expressly require every union it covers to adopt a constitution, but every constitution to address twelve specific subject areas. 29 U.S.C. §431(a)(5); 29 C.F.R. §402.2. One area required to be covered in detail is the "procedures" for the "ratification of contract terms." 29 U.S.C. §431(a)(5).

Can it really be supposed that Congress required these procedures to be written down and disclosed if it did not intend the membership to be able to enforce them? Hardly, and any doubt on that score is eliminated by Congress' inclusion of two "savings clauses," 29 U.S.C. §§413, 523, which expressly preserved employees' remedies. They represent "disclaimers of preemption."

Permitting employees to enforce "ratification rights" doesn't frustrate Congress' purpose; preempting such claims does.

Conclusion:

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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1113 Proposal" detailing the cost reductions the Company would seek from its flight attendants under the Bankruptcy Code if the Company filed for bankruptcy. The § 1113 Proposal contained flight attendant cost reductions of $ 470 million annually, i.e., $ 130 million a year more than the reductions the Company was requiring in a consensual agreement with APFA. The company indicated that, over and apart from additional furloughs that would result from implementation of the $ 470 million in annual cost reductions contained in the § 1113 Proposal, the grounding of 85 to 90 aircraft that the Company intended to effectuate if it filed for bankruptcy would result in 2,500 additional flight attendant furloughs.

C. APFA and American Reach a Tentative Agreement on March 31, 2003

The APFA negotiating team reached a tentative Restructuring Participation Agreement ("RPA" or "Restructuring Agreement") with the Company on March 31, 2003. The tentative RPA contained a 15.6% wage cut; reductions in some "premium pay" categories; a 33% reduction in vacation; reductions in the per diem, layover rest time, sick leave and the monthly guarantee; waiver of crew meals; and a number of work rule changes that would result in the need for fewer flight attendants to perform the assigned work. It was estimated that the work rule changes would result in 2,391 flight attendant furloughs. The RPA, as initially agreed to, was to become amendable on April 30, 2009.
On March 31, 2003, the RPA was submitted to the APFA Executive Committee. The Executive Committee received a briefing from the negotiating team on the RPA and adopted a Resolution that

included the following determinations: (1) the APFA President and negotiating team had "vigorously attempted to secure the best agreement that could be reached under the circumstances, given the serious, substantial threat of an imminent bankruptcy filing" by American; (2) the tentative RPA was "the best proposal that could be obtained under the circumstances and taking into consideration the serious, substantial threat of an imminent bankruptcy filing"; (3) "if agreements are not ratified by the Company's employees, there is a great likelihood that the Company will promptly file a bankruptcy petition and that, in the event of such a filing, there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions which exceeds those provided" under the tentative RPA; and (4) "given this reality and in light of the circumstances presented . . . the best interests of the APFA-represented flight attendants will be furthered by ratification of the Company proposal presented to the Executive Committee for its consideration." The Executive Committee directed the tentative agreement be submitted to the APFA membership for ratification. At this point, the parties had yet to agree on final contract language.

III. The Balloting Process

A. The BOD's Adoption of an Expedited, Telephonic Balloting Procedure

The APFA Constitution requires that a ratification vote on a tentative agreement be conducted via mail-in ballot over a 30-day period commencing with the distribution of the agreement's final language. [6] Art. XI

§ 1(C), (E)(2). Ward voiced strong concerns with the Company's imposed ratification deadline, but the Company reiterated that it would file for bankruptcy if the Union did not meet the April 15 ratification deadline. If the membership ratification vote was conducted over a 30-day period, the balloting would conclude after the Company-imposed April 15, 2003 deadline and thus, as per the Company's threats, after the Company had filed for bankruptcy.

On March 19, 2003, the APFA BOD had met by teleconference to discuss how to conduct a membership ratification vote if a tentative restructuring agreement were reached between APFA and American. During its deliberations, the BOD received a memorandum dated March 17, 2003 from the APFA Constitution Committee that had drafted the APFA Constitution. This group of former union leaders reported to the BOD that it had unanimously agreed to the following:

> in drafting the Constitution, the Committee never contemplated the potentially urgent need for ratification that can arise -- as it apparently has now -- in the context of concessionary bargaining. We are confident that had we considered that issue, the Committee would have drafted and recommended an expedited ratification process. Tellingly, in the one situation the Committee did anticipate in which there is an urgency to ratify -- reaching an agreement to end a strike -- the Constitution does provide for a very quick ratification procedure. (See Article XI.2.) Moreover, the Constitution grants the Executive Committee and the Board of Directors broad powers to take

> necessary actions to protect and promote the interests of APFA members.
>
> In light of these provisions, we believe that inherent in the Constitution is Executive Committee and Board of Directors power to deal with a bona fide emergency. Even though the explicit time frame in Article XI.E(2) is 30 days, it would be inconsistent with the spirit of the Constitution to sacrifice the interests of the membership in the name of compliance with a provision that was never intended to govern the exigent situation now confronting us.
>
> Therefore, the Constitution Committee strongly urges APFA to file a lawsuit in Texas state court in Tarrant County seeking a declaratory judgment that the Executive Committee has the constitutional authority to shorten the ratification period if APFA and the Company reach agreement on modifications to the contract. . . . APFA legal counsel would be able to advise the Executive Committee and the Board of the impact such a declaratory judgment would have on potential member challenges to a shortened ratification period. An additional option would be to ask the Company to indemnify APFA for any legal costs and liability that arise if APFA members sue the Union about the ratification issue.

The APFA BOD passed a resolution interpreting the APFA Constitution to allow for telephonic balloting, stating that telephonic balloting was not available when the current APFA Constitution was adopted and that

an alternative to a mail ballot had not been specifically excluded by the Constitution. The resolution provided for a 15-day telephonic balloting process in light of "this potential unprecedented and time sensitive situation." The BOD also stated that using a mail-in ballot for voting on the RPA "would not be in the best interests of the flight attendants" and that "the potential exigent circumstances [required] an expedited balloting process." APFA provided the March 19, 2003 BOD Resolution to the membership along with information on telephonic balloting.

At its March 19, 2003 meeting, the BOD chose the American Arbitration Association ("AAA") to provide telephonic balloting services. On March 31, 2003, AAA mailed to APFA's members ratification ballots that included instructions for voting by telephone on the tentative agreement. Consistent with established practice at APFA, the balloting period commenced with the March 31, 2003 mailing. However, while ballots were mailed on March 31, no one who accessed the AAA voting system could vote until April 3, 2003, when the system was activated. The balloting deadline was April 15, 2003 at 10:00 a.m. CDT.

B. The Membership's Awareness of the RPA's Terms and Final Contract Language

Throughout the February-April 2003 period, APFA utilized its website and telephone hotline, along with other means of communications, to provide information to the membership on events transpiring, including the Resolutions adopted by the BOD and the Executive Committee.

The APFA Constitution, Art. XI § 1(C), required the membership to receive full contract language at the outset of any ratification balloting process. However, because the tentative agreement was not reached until the Company's March 31 deadline, full contract language had not been finalized prior to the commencement of the ratification period.

On April 1, 2003, and before members began to cast ballots, APFA posted a detailed description of the RPA's terms, as they then stood, on the APFA website; this included all the concessions that had been included to arrive at the $ 340 million cost reduction figure. APFA also recommended that flight attendants not vote until they received final contract language.

Also on April 1, 2003, Ward resumed meetings with the Company in order to arrive at final contract language. However, the terms tentatively agreed upon on March 31, 2003, were not finalized until April 8, 2003. Upon finalization, the contract language was posted on the APFA website and mailed by APFA to the membership. Even after this language was submitted to the membership, and continuing until April 14, 2003, APFA attempted to negotiate further terms providing benefits to the membership.

On April 9, 2003, APFA conducted a nationwide Webcast to provide members with a detailed review of the RPA. Members could either view the Webcast at select meetings across the country or via a personal computer. However, technical difficulties ensued, and many members could not view it. After April 9 and for the remainder of the balloting period, the Webcast remained on the APFA website.

Throughout the balloting process, including during the Webcast, Ward characterized the RPA as a highly concessionary agreement. He urged members to vote, citing the importance of the issues before them.

C. Changes to the RPA's Terms After March 31, 2003

Between April 1 and April 14, 2003, various changes were made to the RPA, all potentially beneficial to APFA, including the Company's agreement to (1) shorten the duration of the RPA by four months; (2) permit the Union to serve an early notice to reopen the agreement and begin negotiations in January 2007; (3) provide for the possibility of mid-term wage increases in the event certain financial markers were met by the Company (increases that could supplement the annual 1.5% pay increases that were provided in the RPA); and (4) shorten the time in which stock options granted to flight attendants in the RPA would vest. APFA made no additional concessions. APFA notified its membership of the post-March 31 changes via the APFA website and Hotline.

D. APFA Efforts to Secure More Time for the RPA Ratification Process

APFA made several attempts to secure from the Company additional time beyond the April 15, 2003 Company-imposed deadline for completion of the RPA ratification process. It did so (1) to afford members additional time to consider the RPA, including its final language, and the additional enhancements that the Company had agreed to after the balloting had commenced; and (2) to accommodate a number of

members who had reported difficulties in obtaining ballots or Personal Identification Numbers ("PINs"). Prior to the scheduled close of the RPA balloting period on April 15, 2003, the Company refused each APFA request for an extension.

In the early morning of April 15, 2003, and before the then-scheduled 10 a.m. CST conclusion of the RPA balloting that day, American's then-CEO Carty convened a meeting with APFA national officers and leaders from the other two Unions. At the meeting, Ward stated that some APFA members were having "problems getting [PIN] numbers" and accessing the telephonic vote lines from overseas, Lorraine Mase-Hecker (former American Director of Employee Relations) Dep. 149-50, and understood that others had complained that the final language became available only on April 8, 2003. Also at the meeting, an APA officer indicated that APA had received reports of APFA members expressing to APA-represented pilots a desire for the opportunity to change their votes, as the memberships of APA and TWU had been able to do throughout the balloting. Also, Carty had learned from several sources that, if allowed to re-vote, many flight attendants would change their votes to "yes." Carty believed that, given one more day, the RPA would be ratified.

Following the discussion, Carty offered to permit a brief extension in APFA balloting until 5 p.m. on April 16, 2003, and to defer a bankruptcy filing for this additional day. In response, Ward stated that this was insufficient and requested an extension of several days. The Company refused. Ward stated he would have to present the Company's offer to the BOD.

On the morning of April 15, 2003, Linda Herod-Rivas (American flight attendant and APFA National Balloting Committee ("NBC") member) and NBC member Leatha Harding-Berry were present at AAA's offices in New York City to receive the ballot results scheduled to be tallied that day. Shortly after 10 a.m. CST on April 15, 2003, the AAA informed Herod-Rivas that the initial balloting period had yielded 9,842 "no" votes and 9,309 "yes" votes. Both the APA and TWU memberships ratified the RPA.

E. APFA Accepts American's Offer of a One-Day Extension for Balloting

The BOD met by teleconference during the afternoon of April 15, 2003, to consider the Company's offer of a one-day extension. By noon, the BOD learned via news report that ratification had failed. [7]

At the conclusion of the April 15, 2003, teleconference, a majority of the BOD adopted a Resolution stating that the extension offered by American was

> shorter than desired, [but] that the best interests of the membership will continue to be served by taking all necessary action to avoid a bankruptcy filing if possible, and that this can best be accomplished under the present circumstances and in light of the intervening events . . ., by permitting flight attendants a further opportunity to vote and/or to change their votes if they so desire on the Company proposal.

The Resolution further states that the BOD's decision to accept the extension and permit members the option of changing votes was based on several factors, including that (1) final language for the RPA was completed "several days after the balloting period had commenced"; (2) "additional agreements" had been reached during the balloting period providing enhancements to the RPA, "including as recently as 8 p.m. on April 14, . . . which could have impacted the voting if additional time had been available for consideration by the flight attendants"; (3) "the APFA membership has voted to reject the Company proposal by a very slim margin"; (4) "there remains a high likelihood of an imminent bankruptcy filing by the Company"; (5) "in the event of a bankruptcy filing, there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions which exceeds those provided under the Company proposal that has been presented to the membership for a ratification vote"; and (6) "a number of flight attendants reported that they were unable to cast votes and/or [encountered] extensive difficulties and confusion...with the voting process."

APFA informed the Company that the BOD had agreed to the extension. APFA also informed its members, through its hotline and website, that RPA balloting had been reopened and would continue until April 16, 2003 at 5:00 p.m. CST and that members could change their votes during this balloting period. The hotline also notified members that the RPA had not achieved ratification during the initial balloting period. The RPA ratification balloting reopened at around 4:30 p.m. on April 15, 2003 and continued through 5:00 p.m. CST on April 16, 2003.

F. Balloting During the Extended Voting Period

Approximately 1,300 members voted for the first time during the extension period and any member who previously voted was permitted to change her or his prior vote. Flight attendants who had previously voted had the option of (1) changing a prior "no" vote to a "yes" vote; (2) changing a prior "yes" vote to a "no" vote; (3) voting the same way they previously had voted; or (4) not recasting a ballot, in which case the vote cast during the pre-extension balloting period was counted in the final tally. [8]

At the conclusion of balloting at 5 p.m. CST on April 16, 2003, there were 10,761 "yes" votes in favor of approval of the RPA and 9,652 "no" votes against approval of the RPA. At this point, APFA and American considered there to be a ratified RPA. Using records furnished by AAA, the NBC contacted a number of flight attendants identified by AAA as having cast a ballot during the extension period in order to verify that these flight attendants in fact had cast a ballot -- but not how they voted -- as reflected on AAA records. Each flight attendant the NBC contacted verified that she or he had cast a ballot during the extension period.

G. American's Direct Communications With APFA Members

At or around the commencement of the voting period, American's then-CEO Carty, on "four or five" occasions, made speeches directly to union members in which he said "voting no is a vote for bankruptcy" and "voting no is a vote for additional job cuts." Carty Dep. 86-87. He further stated that, if American were to file for

bankruptcy, there would be an additional $ 500 million in employee cost cuts, including the cutting of 1000 more pilot jobs and 2500 flight attendant positions. Carty's purpose was two-fold: "[o]ne, make it very clear to our employees what the facts were, and two, I think to hold out to them that in spite of the challenges we were facing and the very difficult decisions we all had to make here, that if we could avoid bankruptcy, there clearly was opportunity going forward." Carty Dep. 89. The speech was written "very much with a carrot[, as opposed to a stick,] in mind." *Id.* Carty "very much wanted to see the company avoid bankruptcy." *Id.* at 90. He believed the only way to avoid bankruptcy at that point was for the unions to ratify the RPAs.

During the balloting extension between April 15 and 16, 2003, the Company again communicated with American flight attendants. American personnel approached flight attendants at airport gates and arranged for a "pop-up" message to appear when flight attendants signed into the computer system upon arriving for work which advised them of the extension and their ability to re-vote. American also prepared a written message, copies of which were placed under the doors of flight attendants' hotel rooms. This message stated:

> The company was advised this morning that the APA and TWU consensual agreements have been ratified. The APFA is the only union that has not yet ratified its agreement. However, the [APFA] has advised us that, unlike the other union groups, once members initially voted, they were not able to change their position, even after the contract was improved during the ratification process.

> In an effort to give flight attendants the same opportunity available to other union employees, and in consideration of the importance of this matter to American, all of its employees and their families, since a final failure to ratify would cause a bankruptcy filing by the Company, the Company has agreed to the APFA's request to extend the voting period until 5 p.m. CDT, Wednesday, April 16 during which time flight attendants will be permitted to change their ballots if they wish to do so. No one is required to vote again. Any votes not changed will be counted as they currently stand.
>
> This message is to advise you of this development and encourage you to participate in this vital process. If you did not have an opportunity to vote or wish to change your vote you may call the [AAA]. . . . Additionally, you can call [the AAA] if you have any questions or have misplaced your PIN number.

Through Americans' computer systems, phone lines, bulletin boards, in hotels, in crew lounges and at airports, the Company provided this message or similar messages to flight attendants regarding the RPA balloting, the extension, and the ability to change votes. One flight attendant, Anne Galazin, was provided information on eight occasions. The repeated communications "frustrated" her, causing her to consider, if anything, changing her "yes" vote to a "no" vote. Galazin Dep. 60 61. Further, according to reports received by APFA, American reimbursed some flight attendants for the cost of telephone calls to the RPA balloting line because their foreign locations prevented

them from accessing the 800 number free of charge. Plaintiffs also offer evidence regarding APFA's and American's knowledge of individual flight attendants' ID numbers and perhaps PIN numbers, the manner in which PINs were assigned, and the possibility that flight attendants could surmise others' PINs; they imply a lack of security in the balloting.

American's communications with APFA members "troubled [Ward] greatly . . . [b]ecause the company had no right to insert itself into our internal matter." Ward Dep. 360. Ward recalled hearing other reports that "the company plac[ed] messages at hotels in various layovers, cities, informing flight attendants that they could continue voting, that they could change their vote." *Id.* at 361. Ward "was very upset . . . [and] very angry." *Id.* at 361-62.

APFA considered American's communications to be an inappropriate intrusion into the balloting process. Ward telephoned Carty and Lorraine Mase-Hecker, American's Director of Employee Policy and Relations, in the evening of April 15, 2003, and protested the Company's conduct. On April 16, 2003, Ward faxed a letter to Mase-Hecker which included the following:

> We have received numerous reports of widespread company interference and coercion in the ongoing ratification process since the decision was made to extend the APFA balloting period through 5 p.m. Central Time on April 16. The Company's actions violate the rights of APFA and the flight attendants it represents under the Railway Labor Act and are directly undermining the ratification process. As I

> informed you last night, this conduct must stop immediately.
>
> We have been deluged with complaints from flight attendants expressing outrage at the Company's involvement in the Union's internal voting process and at the pressure tactics being employed by the Company. Once again, the Company is showing total disrespect for the flight attendants and for their designated bargaining representative. And once again, the Company has demonstrated its ability to shoot itself in the foot. In simple terms, we are insisting that the Company BACK OFF AND STAY OUT OF OUR VOTING PROCESS.

This warning "did not cause a halt in the company's actions." President's Report, Ward Ex. 10.

The Company stated its position directly to the flight attendants: "a vote for bankruptcy is a vote against 10,000 jobs and the secure future of 100,000 American Airlines employees." Carty Dep. 52-54. The Company took the position that its actions did not overstep the line of permissible communication.

IV. American Funds Special Bonuses and a Retirement Plan for Company Executives

On the morning of April 17, 2003, the morning after RPA ratification, media reports emerged that 45 Company executives received special retention bonuses and that a Special Executive Retirement Plan (the "SERP") had been funded and would be protected from creditors in the event of bankruptcy. APFA's

leadership had no prior knowledge of the retention bonuses or SERPs.

Ward informed members that "[t]he disclosures on April 17 demonstrated that the company had lied and had not provided the 'most complete and reliable information,'" as it had represented. President's Report, Ward Ex. 10. Thus, "[b]ecause of the company's outrageous conduct and the company's highly improper intrusion into our ratification process during the April 15-16 extension period, [Ward] informed the company that a reballot of the membership was essential." *Id.*

On April 22, 2003, the APFA BOD convened and passed a Resolution setting aside the April 16, 2003 ratification vote as "tainted" and directing the NBC to make arrangements to provide for another RPA ratification balloting of the membership because (1) during the 1-day extension, "the Company actively and improperly inserted itself into the ratification process and inundated and pressured APFA members into casting votes and/or changing their votes, despite APFA's protests, including directly to Company CEO Don Carty"; and (2) American had misled APFA when it represented that it had "provided to APFA prior to conclusion of the Agreement information that 'was the most complete and reliable information available to the Company to the best of its knowledge.'" As directed by the BOD, the NBC prepared for a new ratification vote by mail-in ballot over a 30-day period.

V. The April 25, 2003 BOD Resolution

On April 23, 2003, a four-person Congressional delegation from Texas met with Carty, other top

Company officials, and leaders of the three unions in an effort to resolve the dispute. During this meeting, American argued that the RPA had been conclusively ratified and that APFA could not proceed with a re-ballot. American threatened that, if APFA proceeded with a new ratification vote, it would file for bankruptcy without awaiting the results of the balloting. Nevertheless, American offered certain additional benefits in exchange for APFA's promise to forego a re-vote and honor the April 16, 2003 ratification.

On April 24, 2003, largely as a result of the three unions' demands, Carty resigned as CEO. Gerard Arpey replaced him. APFA, however, declined to drop its challenge.

In the evening of April 24, four APFA Officers met with Arpey. The APFA Officers urged Arpey to defer filing a bankruptcy petition until after APFA completed a new balloting of the APFA membership. They also urged Arpey to eliminate from the RPA, as originally drafted, the modification of the "underfly" provision that had been particularly unpopular with APFA members. Arpey agreed to permit APFA to substitute another concession of equivalent cost-saving value to the underfly provision, but only if, by the morning of April 25, 2003, APFA finalized the agreement and withdrew its prior decision to reballot the membership. Otherwise, American would file for bankruptcy without awaiting the results of the additional balloting.

A BOD meeting was convened by teleconference in the early morning of April 25, 2003 to review the

developments of April 23-24, 2003. The BOD believed it must either (1) end the dispute with American by agreeing to finalize the agreement, secure the additional benefits to which the Company had agreed on April 23 and 24, 2003, and not proceed with a new balloting on the RPA, or (2) refuse to do so, understanding that the Company would file for bankruptcy if there were no agreement to resolve the dispute by the morning of April 25, 2003.

Following debate, the BOD adopted a Resolution on April 25, 2003 that, "with great reluctance and under the circumstances presented, withdr[ew] the direction to the [NBC] to proceed to arrange for another ratification vote" and agreed to "significant improvements to the [RPA] which [American] was not willing to provide previously." The Resolution stated that,

> under the circumstances presented, . . . the best interests of the . . . flight attendants will be served by securing the significant improvements to the . . . APFA Restructuring Agreement to which the Company has agreed since the Board of Directors adopted [the April 22 Resolution] and by forestalling a Company bankruptcy filing, without a further membership vote, rather than proceeding with a further membership vote which will eliminate Company agreement to provide the significant improvements to the APFA Restructuring Agreement and result in an imminent bankruptcy filing by the Company.

The resolution stated that "the Company indicated that it could not await the outcome of an APFA ratification

ballot and would file for bankruptcy imminently in light of APFA's announced reballoting." American "agreed to refrain from filing a bankruptcy petition if it receives APFA's agreement at this time, and without a further ratification balloting vote." Notwithstanding APFA's "vigorous attempt[s] to obtain Company agreement to drop its insistence on finalization of agreement on the improvements to the APFA Restructuring Agreement without a further ratification balloting, . . . the Company . . . refused to modify its position on reballoting." Thus, because "there is a strong likelihood that the APFA-represented flight attendants will suffer a reduction in wages and working conditions, and additional resulting furloughs of flight attendants, which exceed those that will result under the APFA Restructuring Agreement," the BOD "authorize[d] the APFA President to sign the April 25, 2003 letter of agreement between [American] and APFA."

VI. The April 25, 2003 Letter of Agreement

On April 25, 2003, American and APFA entered into a Letter of Agreement ("LOA") memorializing their "agree[ment] to resolve all disputes which exist between them related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." The parties "agreed that it is in their mutual interest to permit the Restructuring Agreement to become binding and effective." The LOA made the RPA effective beginning May 1, 2003. The LOA was never submitted to the membership for ratification.

The LOA reflected items to which American agreed subsequent to April 22, 2003, including the following

changes to the RPA: (1) a further shortening of the duration of the RPA; (2) a new option for the unions to seek to reopen the RPAs after three years; and (3) a new Annual Incentive Program, which would be more likely to lead to additional payments to the unionized employees, including the flight attendants, than "the Variable Wage Adjustment plan" that had been included in the RPA. With the exception of APFA's promise not to seek a new ratification vote, no other concessions were required by American of APFA.

The parties dispute whether the LOA required membership ratification. APFA asserts that the "enhancements" to which the Company had agreed, on April 23 - 24, 2003, did not reflect "major changes" to the contract with American, such as a change in rates of pay or work rules, and therefore that the LOA did not require membership ratification. Plaintiffs assert that

> each of the following tentative or proposed agreements had to be ratified by the APFA membership: the RPA as originally formulated on March 31, the RPA as amended through April 8, the RPA as amended through April 14, the RPA as amended through April 25 and/or the April 25th LOA in isolation.

The RPA has been in effect since May 1, 2003.

PROCEDURAL HISTORY

The named plaintiffs are twenty-five individuals presently and/or formerly employed by American as flight attendants. Each named plaintiff is a present or former member of APFA and each was a member of

APFA between December 2002 and May 1, 2003. The present case caption reflects three related cases filed in three different venues: *Marcoux, et al. v. American Airlines, Inc., et al.* (No. 04-1376) ("*Marcoux*"), in the United States District Court for the Southern District of New York; *Ford, et al. v. APFA, et al.* (No. 03-4987) ("*Ford*"), in the United States District Court for the Eastern District of New York; and *Lindsay v. APFA, et al.* (No. 04-0634) ("*Lindsay*"), in the Superior Court for the Central District of California, subsequently removed to the United States District Court for the Central District of California. *Marcoux* and *Lindsay* were transferred to this court and consolidated based in part on their being related to each other, to *Ford*, and to the claims set out in the Supplemental Complaint filed by plaintiffs in *Cooper, et al. v. TWA Airlines, LLC, et al.*, (No. 02-3477) (E.D.N.Y.). *See Cooper v. TWA Airlines, LLC*, 2005 U.S. Dist. LEXIS 41007 (E.D.N.Y. July 18, 2005); *Cooper v. TWA Airlines, Inc.*, 349 F. Supp. 2d 495 (E.D.N.Y. 2004); *Cooper v. TWA Airlines, LLC*, 274 F. Supp. 2d 231 (E.D.N.Y. 2003).

Plaintiffs seek an order setting aside the RPA, a declaratory judgment, specific performance of the 2001 CBA, "back wages and benefits plaintiffs would have received but for the imposition of the unlawful agreement," "reinstat[ment of the] flight attendants who were furloughed as a result of the imposition of the [RPA]," compensatory damages from all defendants, and punitive damages from APFA.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A "genuine" issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). That multiple parties "move for summary judgment does not guarantee that there is no material issue of fact to be tried." *Eastman Mach. Co. v. United States*, 841 F.2d 469, 473 (2d Cir. 1988). "In determining whether there is a genuine issue of fact, the court is required to assess each motion on its own merits and to view the evidence in the light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." *Id.*, citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). If, in light of the burdens of production and proof that would be required at trial, there is sufficient evidence favoring the non-movant such that a reasonable jury could return a verdict in that party's favor, a genuine issue of fact exists and summary judgment is not properly granted. *Anderson*, 477 U.S. at 248. Thus, the party seeking summary judgment bears the burden of showing that no genuine factual dispute exists, but the party bearing the burden of proof at trial must, in order to survive summary judgment, make a sufficient showing on the essential elements of its case. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Where the party bearing

the burden at trial fails to make this showing, the movant is entitled to judgment as a matter of law. *Id.*

II. Plaintiffs' RLA Claims

A. RLA Section 152 Seventh

Section 152 Seventh provides:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

45 U.S.C. § 152, Seventh. [9] Plaintiffs claim that the RPA, an agreement that changed the rates of pay and working conditions of APFA's members as embodied in the 2001 CBA, was formed in a manner inconsistent with the requirements of Section 152 Seventh. Therefore, they argue, by complying with it, American violated this provision's status quo requirement. Company Defendants argue that only certified representatives, not individual employees, may bring suit under Section 152 Seventh.

Although RLA Section 152 does not expressly grant a private right of action, *see Bensel v. Allied Pilots Association, et al.*, 387 F.3d 298, 318 (3d Cir. 2004), courts have recognized an implicit private right of action under Section 152 Seventh on behalf of a union against an employer seeking to challenge the employer's unilateral changes in wages and conditions of employment previously fixed by a collective bargaining agreement. *See, e.g., Aircraft Mechanics*

Fraternal Ass'n v. Atlantic Coast Airlines, 55 F.3d 90, 93 (2d Cir. 1995); *International Assoc. of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 781 F.2d 1400, 1408 (9th Cir. 1986). However, that a private right of action may be implied on behalf of a union "does not imply that Congress intended to create a private right of action for any group or groups of individual employees claiming to act on behalf of the relevant employees." *Bensel*, 387 F.3d at 319 (addressing RLA Sections 152 Second and Ninth).

Plaintiffs point to no case where a court has implied a private right of action on behalf of individual employees under Section 152 Seventh. Indeed, of the RLA's several provisions, a private right of action on behalf of individual employees has been implied only as to Section 152 Third and Fourth. *Id.* at 318. Unlike the other provisions of Section 152, Section 152 Third and Fourth "prohibit carriers from discriminating against *employees* in connection with union organizing activities." *Id.* (emphasis in original). Thus, addressing whether an implied right of action may be found under Section 152 Second and Ninth, the Third Circuit found that, "[u]nlike 45 U.S.C. § 152, Third & Fourth, which are directed specifically at the employer's relationship with *employees*, 45 U.S.C. § 152 Ninth & Second are directed at the employer's relationship with the certified *representative*." *Id.* at 319 (emphasis in original). [10]

Like the provisions analyzed in *Bensel*, Section 152 Seventh is directed at the employer's relationship with the employees' certified representative, prohibiting carriers from unilaterally changing "rates of pay, rules, or working conditions of its employees, *as a class as*

embodied in agreements." 45 U.S.C. § 152, Seventh (emphasis added). Thus, only APFA, as the flight attendants' certified representative, could claim a private right of action under this Section. Permitting a private right of action on behalf of individual employees under Section 152 Seventh is inconsistent with this provision's purpose "to impose an obligation on the parties to make every reasonable effort to negotiate a settlement . . . [and] avoid strikes." *Bensel*, 387 F.3d at 315 (addressing the "status quo provisions," including Section 152 Seventh). Section 152 Seventh, designed to foster agreement, would be undermined were individual employees empowered to invalidate settlements previously negotiated by their certified representative and designed to prevent bankruptcy. *Cf. id.* at 319 ("Allowing a group or groups of individual employees to bring a cause of action under section 152, Second or section 152, Ninth of the RLA would undermine the provisions' purpose of providing for an organized process of negotiation between one employee representative and the employer, and could lead to chaos."). [11]

Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 Seventh claim is granted.

B. RLA Section 152 First [12]

Section 152 First provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working

> conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First. [13] Plaintiffs claim that, by not reverting back to the 2001 CBA after recovering from its near-bankruptcy status, American failed to maintain the 2001 CBA in violation of RLA Section 152 First. Company Defendants argue that Section 152 First, like Section 152 Seventh, gives no private right of action to individual employees.

Like Section 152 Seventh, Section 152 First is directed at the employer's relationship with the employees' certified representative. Where a union has been certified to act on the employees' behalf, making and maintaining agreements on their behalf is fundamentally the province of that union. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S. Ct. 2001, 18 L. Ed. 2d 1123 (1967). As the Supreme Court noted there:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen

> representative to act in the interests of all employees.

Id. Further, plaintiffs' position that Section 152 First, which, *inter alia*, directs parties to "settle all disputes," is directed at the employer's relationship with individual employees rather than their union is untenable when Section 152 First is viewed, as it must be, *in pari materia* with Section 152 Second, which states:

> *All disputes* between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated and authorized* so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

45 U.S.C. § 152, Second (emphasis added); *see also Northwest Airlines*, 483 F.3d at 168 ("carriers and *unions* must 'exert every reasonable effort to make [agreements] . . . and to settle all disputes'") (emphasis added), citing 45 U.S.C. § 152, First; *id.* (Section 152 First "'at least requires the employer to meet and confer with the *authorized representative of its employees.*'") (emphasis added), citing *Virginian R. Co. v. System Federation No. 40*, 300 U.S. 515, 548, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

Again, as with Section 152 Seventh, the purpose of Section 152 First - "to avoid any interruption to commerce or to the operation of any carrier," 45 U.S.C. § 152 First - would be undermined were individual employees permitted to bring suit seeking to invalidate

agreements negotiated by their union and designed to avoid such interruptions.

Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 First claim is granted.

C. RLA Section 152 Fourth [14]

Section 152 Fourth provides, in pertinent part:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions. . . .

45 U.S.C. § 152, Fourth. Both plaintiffs and Company Defendants seek summary judgment on plaintiffs'

Section 152 Fourth claim. Plaintiffs alternatively argue, in opposition to Company Defendants' motion, that fact issues remain precluding summary judgment against them.

Plaintiffs claim that American interfered with the process of ratifying the RPA by pressuring APFA to shorten the balloting period and to use a voting method and technology not previously used or sanctioned by the APFA Constitution. Then, plaintiffs assert, American interfered with the actual vote by conveying its message, not only to APFA leadership, but directly to employees, with the purpose of pressuring members to vote in favor of ratification. Finally, plaintiffs assert, American coerced APFA into reneging on its decision to set aside the April 16, 2003 ratification vote in light of American's disclosure of the SERP accounts, and then pressured APFA into dispensing altogether with membership ratification of the LOA. Company Defendants argue that Section 152 Fourth imposes a high standard on postcertification claims, a standard plaintiffs cannot meet. Alternatively, Company Defendants argue that plaintiffs' claims are precluded by the LOA which resolved all disputes between American and APFA.

Section 152 Fourth is addressed "primarily [to] the precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants ("TWA")*, 489 U.S. 426, 440, 109 S. Ct. 1225, 103 L. Ed. 2d 456 (1989). Courts have inferred a right of action to individual employees in the precertification context, recognizing that, in the absence of a certified union and the administrative remedies that arise once a union is certified, individuals

injured by violations of RLA Section 152 Fourth would be without remedy. *See Beckett v. Atlas Air*, 1995 U.S. Dist. LEXIS 11842, *3-4 (E.D.N.Y. Aug. 14, 1995); *see also Bensel*, 387 F.3d at 318. Notwithstanding this precertification focus, a narrow class of *postcertification* claims under Section 152 Fourth may be brought where "'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands'" of the RLA. *TWA*, 489 U.S. at 441, quoting *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300, 64 S. Ct. 95, 88 L. Ed. 61 (1943). Company Defendants do not dispute that an individual employee has an implied right of action in federal court under Section 152 Fourth in the postcertification as well as precertification context. However, to establish the need for a federal court remedy for an alleged violation of Section 152 Fourth in the postcertification context, plaintiffs must show that

> the employer's conduct has been motivated by anti-union animus or an attempt to interfere with its employees' choice of their collective bargaining representative, or constitutes discrimination or coercion against that representative, or involves acts of intimidation [which] cannot be remedied by administrative means.

Independent Union of Flight Attendants v. Pan Am. World Airways, Inc. ("IUFA"), 789 F.2d 139, 142 (2d Cir. 1986) (internal quotation marks, citations, and ellipses omitted). [15] *IUFA* recognized that, although individual employees typically, with union representation, bring grievances before an RLA-created arbitral board, such efforts would be futile

where, because of improper carrier conduct, the union's effectiveness and/or ability to defend its members' rights under the CBA are compromised. However, because the carrier conduct in *IUFA* was not motivated by anti-union animus and did not "destroy the effectiveness of the union representative," *id.*, the RLA's dispute resolution mechanism was functional. In other words, the system created by the RLA - dependent on effective union representation - had not broken down. As a result, the claim was "administratively cognizable," precluding the district court from exercising subject matter jurisdiction. *Id.* at 143.

In a different postcertification context - the post-mediation self-help period under RLA Section 6 during which certain forms of economic force are permissible - the Supreme Court has held that courts should "hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself." *TWA*, 489 U.S. at 442. *TWA* stressed that no employer or union conduct "prevented the scheme of the RLA from working" - that is, the conduct was not "inherently destructive of union or employer activity." *Id.* Although the dispute in this case did not arise in the post-mediation Section 6 context, the Supreme Court in *TWA* clearly viewed the availability of postcertification relief in federal court as existing only in extreme circumstances.

Accordingly, plaintiffs' argument, based on the statutory language of 45 U.S.C. § 152 Fourth, that they must show mere "interference" with the Union is not persuasive. Whatever the standard applicable where a

union seeks a ruling on a postcertification claim in arbitration, the ability of individual plaintiffs to bring a postcertification claim under Section 152 Fourth in federal court is greatly circumscribed.

Company Defendants, for their part, argue that the very existence of collectively bargained agreements between APFA and the Company, namely, the RPA and the LOA, establish that any anti-union animus claim against them cannot succeed. Of course, courts look to the existence of a collectively bargained agreement as evidence of whether anti-union animus has been shown. *See, e.g., Dempsey v. Atchison, T. & S.F. Ry.*, 16 F.3d 832, 843 n. 8 (7th Cir. 1994) ("As an aside, it would seem that the phrase 'anti-union animus' refers to an employer's general hostility towards union activity. Here, Santa Fe did not demonstrate antiunion hostility; in fact, it dealt favorably with a union, UTU, in executing Side Letter 11."), *cert. denied*, 513 U.S. 821, 115 S. Ct. 82, 130 L. Ed. 2d 35 (1994); *Renneisen v. American Airlines, Inc.*, 990 F.2d 918, 918 (7th Cir. 1993). However, Company Defendant's position, if accepted, would eliminate any possibility of a union member bringing a Section 152 Fourth claim challenging an agreement, even where the union's integrity has been utterly compromised by the company; therefore, it overstates the already difficult hurdle plaintiffs face. Instead, individual plaintiffs must show that anti-union conduct on the part of the carrier compromised the union's ability to represent its members such that individual employees have effectively been deprived of representation and to collective bargaining as contemplated by the RLA.

Company Defendants further argue that the LOA forecloses a postcertification Section 152 Fourth claim because its very purpose was to settle all claims between APFA and the Company. This argument also goes too far. Were the LOA shown to be the product of coercion of the Union by the Company, a claim could be stated.

Here, plaintiffs fall far short of meeting their burden of producing facts sufficient to survive summary judgment. Although plaintiffs identify several facts which, they assert, show Company interference and pressure exerted on APFA and individual members, these facts do not demonstrate anti-union animus, and they do not support a finding that American sought to or did compromise the integrity of APFA, whose leadership supported the agreement. Stated another way, the evidence of the economic pressures which the Company brought to bear in obtaining both the RPA and the LOA does not support a finding by a reasonable factfinder that American was motivated by antiunion animus, or that the pressures were aimed at undermining or compromising the Union's effectiveness. To the contrary, the economic pressures arose from a dire economic predicament to which, as the undisputed facts establish, APFA responded with independence of judgment. Further, that American withheld from APFA information regarding its SERP accounts is not evidence of a Company attempt to undermine APFA's ability to act as its employees' representative. Although American's conduct was deceptive, it did not compromise the integrity of the Union which, upon learning of the existence of the SERP accounts, responded by securing in the LOA concessions beneficial to the membership. No evidence

suggests that this response, or any other APFA conduct, was not the product of the Union's independent judgment.

Similarly, plaintiffs' evidence that American interfered with individual employees' decisions whether to vote for or against ratification is insufficient to meet the standard for a postcertification Section 152 Fourth claim. The parties dispute whether statements relied on by plaintiffs, made to individual employees other than plaintiffs, to encourage them to ratify the RPA, constituted misconduct under RLA Section 152 Fourth. This dispute need not be addressed, however, as the standard in this postcertification case is anti-union animus - that is, the focus must be on the impact of carrier conduct on the Union, not on the individual employees. *See IUFA*, 789 F.2d at 142 (Section 152 Fourth prohibits "discrimination or coercion *against that representative*") (emphasis added). Under that standard, plaintiffs cannot succeed. Indeed, no evidence indicates that American's importuning of individual employees, conduct to which APFA objected, compromised the Union's independence or its ability to protect the interests of its members such that the efficacy of the RLA's dispute resolution mechanism was threatened.

In essence, plaintiffs seek to overturn the RPA and LOA because they disapprove of positions taken by APFA in reaching the agreements and they disagree with APFA's leadership that the agreements are in APFA members' best interests. Based on the undisputed facts, they have failed to show that the integrity of the Union and its ability to bargain on the employees' behalf were compromised by Company

conduct. As the Court of Appeals for the Seventh Circuit held in rejecting similar claims,

> RLA Section was not designed to give minority groups within a union a cause of action against their employer when they cannot persuade their own union to take actions they deem to be in the union's best interest.

Renneisen, 990 F.2d at 924.

Accordingly, Company Defendants' motion for summary judgment with regard to plaintiffs' RLA Section 152 Fourth claim is granted, and plaintiffs' motion is denied.

III. Plaintiffs' DFR Claims

All parties seek summary judgment on plaintiffs' DFR claims. As detailed below, plaintiffs urge the court to adopt a "per se" standard of DFR liability. APFA meanwhile seeks judgment under traditional DFR standards enunciated in *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). Plaintiffs assert that, if the court applies *Vaca* and thus rejects their "per se" theory, issues of fact remain precluding summary judgment in APFA's favor. Company Defendants side with APFA and note further that carrier liability on a DFR theory does not lie in the absence of union liability.

A. The DFR Standard

"When a labor organization has been selected as the exclusive representative of the employees in a

bargaining unit, it has a duty, implied from its status . . . as the exclusive representative of the employees in the unit, to represent all members fairly." *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L. Ed. 2d 242 (1998), citing, *inter alia*, *Vaca*, 386 U.S. at 177. The DFR requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177. In other words, "a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational." *Id.* (internal citation omitted). To be discriminatory, union conduct must be "intentional, severe, and unrelated to legitimate union objectives," as in the case of invidious discrimination based on race or gender. *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). "[B]ad faith requires a showing of fraudulent, deceitful, or dishonest action." *White v. White Rose Food*, 237 F.3d 174, 179 (2d Cir. 2001) (internal quotation omitted). "Judicial review of union action 'must be highly deferential, recognizing the wide latitude that [unions] need for the effective performance of their bargaining responsibilities.'" *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998), quoting *O'Neill*, 499 U.S. at 67. Finally, if plaintiffs can satisfy the *Vaca* standard, they must then demonstrate "a

causal connection between the union's wrongful conduct and their injuries." *Id.*

B. Plaintiffs' Motion For Summary Judgment

According to plaintiffs, "'fair representation' means different things in different contexts." Pl. Br. 42. Conceding that the *Vaca* standard governs APFA's conduct during *negotiation* of the RPA, plaintiffs argue that APFA's conduct during the RPA *ratification* process - specifically, alleged violations of the APFA constitution - is subject to a "per se" standard of liability under which any such violation amounts to a DFR breach. This "per se" standard, plaintiffs assert, applies to all union conduct during the ratification process because the APFA constitution expressly reserves ratification to the membership and prescribes rules governing ratification to which APFA is bound. *Id.* at 44. Then, arguing that American "participated" in APFA's "per se" DFR breaches, plaintiffs seek judgment holding APFA and Company Defendants jointly and severally liable for breach of APFA's DFR.

Plaintiffs provide no authority for their "per se" theory of liability, and the court is aware of none. In a related case, Judge Amon rejected this argument. *See Cooper, et al., v. TWA Airlines, LLC, et al.*, 274 F. Supp. 2d 231, 247 (E.D.N.Y. 2003). Simply put, the *Vaca* standard "applies to all union activity." *O'Neill*, 499 U.S. at 67. Because the Court rejects plaintiffs' "per se" theory of DFR liability, their motion for summary judgment on their DFR claims, predicated solely on that theory, is denied.

C. APFA's Motion For Summary Judgment

APFA moves for summary judgment on the ground that none of its conduct during negotiation or ratification of the RPA and subsequent LOA fell below the *Vaca* DFR standard. APFA asserts that a union's DFR permits it to apply its constitution flexibly in a manner that the union, in the exercise of its judgment, determines will best protect the represented employees' interests, particularly when faced, as was APFA, with dire circumstances. APFA argues that entering the RPA in an expedited fashion was the only alternative to the near-certainty that American would file for bankruptcy, leaving APFA's membership in a position worse than that contemplated by the concessionary agreement. Then, APFA argues, by entering the April 25, 2003 LOA, it chose to maintain the RPA, now with additions beneficial to APFA's membership, to once again avoid a dire bankruptcy scenario. Plaintiffs assert that issues of fact remain which preclude APFA's motion for summary judgment on the DFR claims.

There is no dispute that APFA was concerned about the strong possibility that, in the absence of significant concessions from the union, American would file for bankruptcy, subjecting union members to employment conditions more onerous than those sought via concession. Viewing APFA's conduct during the negotiating and ratification of the RPA and LOA favorably to plaintiffs, though with appropriate deference to the union, *see Spellacy*, 156 F.3d at 126, APFA's actions were rational and not arbitrary. APFA was faced with the credible threat that, unless it agreed to $ 340 million in annual concessions by the March 31, 2003 and April 15, 2003 deadlines imposed by American, the company would file for bankruptcy. It is undisputed

that American represented to APFA that, in bankruptcy, it would ground 85 to 90 airplanes, causing 2,500 more flight attendant furloughs than if it reached agreement outside of bankruptcy, and that it would seek to impose an additional $ 130 million in labor cost reductions. The evidence establishes that APFA's leadership reasonably believed it had reached the best solution possible on behalf of its members. Therefore, no finding of hostility or bad faith is warranted.

Nor have plaintiffs shown an issue of fact as to whether APFA's decision to accept American's offer to extend the balloting period for 31 hours was arbitrary or made in bad faith. To the contrary, the undisputed evidence establishes that, consistently throughout the initial balloting period, APFA had sought an extension, but American rebuffed these requests, insisting that, if the RPA were not ratified by the April 15, 2003 deadline, American would file for bankruptcy. The evidence also establishes that Ward was concerned that some members were having technical difficulties with voting and that members had complained about not receiving final contract language until April 8, 2003. Also, Ward and Carty were aware that APA, the pilots' union, had received reports that some APFA members expressed to APA-represented pilots a desire to change their votes, as APA and TWU members had been able to do throughout the balloting. In fact, Ward thought a one-day extension insufficient, and he requested an extension of several days, which the Company refused. Because Ward consistently sought more time for APFA members to consider the proposed RPA, APFA's acceptance of American's offer for an extension, once finally extended, cannot be viewed as arbitrary or in bad faith. Indeed, no evidence indicates that, as

plaintiffs suggest, APFA's interest in the extension was based on anything other than its good faith assessment of its members' best interests.

As for APFA's decision to enter the LOA without membership ratification, Article XI § F of the APFA Constitution required ratification only if the Executive Committee determined that the alterations to the RPA embodied in the LOA were "substantial." But whether or not the alterations were substantial, APFA's decision to enter into it cannot be considered irrational or arbitrary in light of its reasonable fear that American would file for bankruptcy in the absence of agreement. Plaintiffs offer no evidence that APFA's decision to enter the LOA was "fraudulent, deceitful, or dishonest," *White*, 237 F.3d at 179, and thus no finding of bad faith is warranted.

Finally, in a conclusory manner, plaintiffs argue that APFA's conduct amounted to discrimination against its members in violation of its DFR. However, no evidence indicates that APFA's conduct was "unrelated to legitimate union objectives" or invidious. *Amalgamated*, 403 U.S. at 301. Plaintiffs have therefore failed to raise a triable issue of fact as to discrimination.

Plaintiffs raise several fact issues which they argue preclude summary judgment in APFA's favor. First, plaintiffs have produced evidence indicating that APFA's conduct did not comply with its constitution. With regard to ratification of the RPA, evidence indicates that APFA arranged for telephonic balloting to be conducted over a 15-day period, in accordance with the determination made by the BOD in its March

19, 2003 resolution. However, the constitution requires mail-in balloting over at least 30 days. *See above* Facts § III(A), n. 6. Also, evidence indicates that, although it was required to provide members with the complete changes embodied in the RPA either at the start of or prior to the balloting period, *see id.*, APFA did not do so. Finally, APFA entered the April 25, 2003 LOA without membership ratification. *See id.* However, "in light of both the facts and the legal climate that confronted [APFA] at the time the decision[s were] made," *O'Neill*, 499 U.S. at 78, as discussed above, no reasonable jury could find these actions "arbitrary, discriminatory, or in bad faith," *id.* at 67.

Second, plaintiffs submit that an issue of material fact exists with regard to whether APFA acted in bad faith or arbitrarily when its BOD passed the March 19, 2003 resolution interpreting the APFA constitution as providing for telephonic balloting over a 15-day period rather than mail-in balloting over 30 days. [16] Based on the undisputed fact that the Constitution Committee members stated they "never contemplated the potentially urgent need for ratification that can arise - as it apparently has now - in the context of concessionary bargaining," plaintiffs argue, "[a] jury could reasonably find . . . that the Union could not in good faith 'interpret' language to have a meaning that the drafters of the language state they never intended." However, the Constitution Committee stated that abiding by the 30-day provision in this context "would be inconsistent with the spirit of the Constitution." Under these circumstances, and on the undisputed facts, no reasonable jury could conclude that the BOD's interpretation was arbitrary or made in bad faith. Finally, notwithstanding that APFA chose not to heed

the Constitution Committee's advice to seek a declaratory judgment with regard to this interpretation of the constitution, *see above* Facts § III(A), no evidence indicates that APFA did so with "improper intent, purpose, or motive," *Spellacy*, 156 F.3d at 126, such that a finding of bad faith may be warranted. All evidence indicates that APFA's motive was to avoid an American bankruptcy and thereby preserve its members' interests.

Third, plaintiffs assert that the following evidence gives rise to an issue of material fact with regard to whether APFA acted in bad faith: (1) at the time APFA's financial advisor Mark King delivered his report on American's deteriorating financial condition, he was unaware that American would soon receive over $ 1 billion in aid from the government; and (2) American's cash balance would remain "fairly steady through June 30, right around the $ 1 billion mark." Jeffrey Campbell (former American Chief Financial Officer) Dep. 109. This evidence does not raise a triable issue of fact as to whether, at the time APFA relied on King's report, among other sources of information, it did so in bad faith.

Fourth, although there is a factual dispute as to what details APFA and Company officials knew about the vote tally, that dispute is not material as APFA and American do not dispute that the decision to extend the voting period for one day was made, in part, because APFA and the Company knew ratification would fail. Indeed, APFA's April 15, 2003 Resolution accepting the Company's offer of an extension explicitly states, "WHEREAS, the APFA membership has voted to reject the Company proposal by a very slim margin. . .

." Thus, APFA's knowledge with respect to the actual vote tally is irrelevant; the RPA's imminent failure was known. In any event, even if APFA had actual knowledge of the vote tally prior to agreeing to the extension, no evidence indicates that APFA's decision to extend the voting was made with "improper intent, purpose, or motive." *Spellacy*, 156 F.3d at 126. The court sees no basis for holding that APFA could not consider the likelihood ratification would fail in determining whether to agree to the extension.

Finally, plaintiffs proffer certain additional evidence which they assert creates a disputed issue of fact as to whether APFA acted arbitrarily or in bad faith, including evidence that (1) a significant number of APFA members experienced difficulties accessing the voting system; (2) some members were unable to vote because they had not received PIN numbers; (3) prior to accepting American's offer to extend the voting period and give members the opportunity to change their votes on April 15, 2003, APFA had, on April 10, 2003, considered and rejected the idea that members should be permitted to re-vote and/or change votes; and (4), after deciding to conduct a re-vote in the wake of American's disclosure of the SERP accounts, APFA reversed itself and entered the April 25, 2003 LOA. None of this evidence creates a triable issue of fact as to bad faith or arbitrariness.

In sum, evidence adduced by plaintiffs in opposition to APFA's motion for summary judgment fails to raise a triable issue of fact as to whether APFA's conduct was arbitrary, discriminatory, or in bad faith. Based on the record evidence, no reasonable jury could find that APFA's conduct fell below the *Vaca* standard.

Therefore, APFA's motion for summary judgment with regard to plaintiffs' DFR claims is granted.

D. Company Defendants' Motion For Summary Judgment

Because employer liability on a DFR theory is derivative of union liability, Company Defendants' motion for summary judgment with regard to plaintiffs' DFR claims is granted. *Simberlund v. Long Island R. Co.*, 421 F.2d 1219, 1228 (2d Cir. 1970).

IV. Plaintiffs' Claim for Breach of the Union Constitution

Plaintiffs have remaining a claim against APFA for "breach of the union constitution," which they contend is a breach of contract claim under New York law. APFA moves for summary judgment on this claim, construing it as a claim for breach of APFA's DFR. The allegations underlying plaintiffs' claim for "breach of the union constitution" are, in substance, identical to those in plaintiffs' DFR claims. This claim is therefore a "mere refinement" of the duty of fair representation and, as such, preempted by federal law. *See Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 507-08 (E.D.N.Y. 2004); *Marcoux v. Am. Airlines, Inc.*, 2006 U.S. Dist. LEXIS 14130, * 22 n. 4 (E.D.N.Y. Mar. 28, 2006). APFA's motion for summary judgment with regard to this claim is granted.

CONCLUSION

For the reasons set forth above, the motions for summary judgment filed by Company Defendants and

APFA are granted in their entirety. Plaintiffs' motion for summary judgment is denied, and their motion for class certification is dismissed as moot. The Clerk of Court is directed to enter judgment for the defendants.

SO ORDERED.
/s/ Nina Gershon

NINA GERSHON

United States District Judge

Dated: July 22, 2008
Brooklyn, New York

Footnotes

1 Under the RLA, disputes over the terms of new collective bargaining agreements, or "major disputes," *see Pan American World Airways, Inc. v. International Brotherhood of Teamsters, etc. ("Pan Am")*, 894 F.2d 36, 38 (2d Cir. 1990), are governed by the procedural requirements of RLA Section 6, 45 U.S.C. § 156. When a collective bargaining agreement is nearing expiration and one party seeks changes, that party must serve the other party with notice of proposed changes. The dispute is then subject to mediation under the auspices of the National Mediation Board. During mediation neither party may resort to any self-help measures, e.g., strike, work slow-down, etc. If mediation is unsuccessful and one or both of the parties refuse to submit the controversy to arbitration, the parties must then observe a thirty-day "cooling-off" period. *See* 45 U.S.C. § 155(1)(b); *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 481

U.S. 429, 445, 107 S. Ct. 1841, 95 L. Ed. 2d 381 (1987). Once the cooling-off period has expired without an agreement, the parties may then resort to economic force. *See Pan Am*, 894 F.2d at 38.

2 Although the CBA reached in 2001 was retroactive, becoming effective as of November 1, 1998, the court will refer to it as the "2001 CBA."

3 "An 'amendable' date typically provides that the agreement will continue through the amendable date and thereafter unless written notice of intended change is served in accordance with RLA Section 6 within a specified period prior to the amendable date." *Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA*, 349 B.R. 338, 349 n. 4 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007).

4 The APFA Constitution, Art. III, § 3(A), provides:

> The Board of Directors is authorized and empowered to take any and all lawful action consistent with this Constitution to safeguard and protect the APFA, and the rights, privileges, duties and responsibilities of the officers, representatives and members of the APFA. The Board of Directors is authorized to interpret this Constitution and to establish, prescribe and adopt such other policies which may be consistent with this Constitution as required for the direction and management of the affairs of the APFA.

5 Later, APFA learned that American had not shared with APFA information regarding its bankruptcy-

protected retirement plan for senior officers. *See below* Facts § IV.

6 With regard to ratification, APFA Constitution Art. XI §1 provides:

> A. A proposed Collective Bargaining Agreement will be submitted to the affected membership for approval only after it has been accepted by a majority vote of the Negotiating Committee and presented to the Executive Committee.
>
> > (1) Should the Executive Committee reject a proposed agreement, the Negotiating Committee shall present the proposed agreement to the Board of Directors.
> >
> > (2) The Board of Directors may decide to submit the proposed agreement to the membership for approval.
>
> B. . . .
>
> C. The affected membership shall be given the complete changes to a Collective Bargaining Agreement prior to or at the start of the balloting period.
>
> D. A proposed Collective Bargaining Agreement shall be ratified by an affirmative vote by a majority of those active members in good standing covered by the applicable Agreement who return valid ballots. Members may vote only on those agreements which apply to their

respective airline(s), unless covered under a master agreement.

E. Balloting:

1. The sole issue to appear on the secret ballot shall be the ratification of the Collective Bargaining Agreement.

2. The time limit for the return of ratification ballots (the Balloting Date) shall be not less than thirty (30) days after the mailing of the ballots to the respective membership.

F. Any letters of agreement or side letters entered into between an employer and the APFA during or outside of the Collective Bargaining negotiations which alter the rates of pay, rules, or working conditions for covered Flight Attendant employees shall be subject to ratification by the Executive Committee. If the Executive Committee determines that the alteration is substantial, such letter of agreement or side letter shall be submitted for ratification to the membership covered by the applicable Agreement pursuant to the procedures outlined in this Article XI.

G. Upon ratification by the membership, a Collective Bargaining Agreement and/or letters of agreement shall be deemed binding.

7 Plaintiffs appear to challenge the admissibility of all factual assertions regarding what was or was not

discussed during the April 15, 2003 BOD meeting on the ground that APFA failed to record it and produce a transcript as required by the APFA Constitution. Factual assertions challenged include: (1) that during the teleconference, arguments were presented both for and against acceptance of the extension; (2) that board members discussed that the other two unions provided members with the option of changing votes throughout the balloting period; and (3) that at least one board member voiced concern that allowing members to change votes could be unfair to members who had discarded their PIN numbers after voting. Assuming APFA did have a duty to record these meetings and produce a transcript, its failure to do so is not a ground for inadmissibility, and plaintiffs offer no other challenge to this evidence.

8 Plaintiffs question whether flight attendants had the ability to exercise either the third or fourth option. However, the record evidence reveals nothing to indicate that they did not.

9 For a discussion of Section 6 of the RLA, *see above* n.1. Section 152 Seventh is one of several "status quo" provisions in the RLA which require parties to a CBA governed by the RLA to maintain, during the pendency of any dispute arising under their CBA, the working conditions in place prior to inception of the dispute. *See Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA*, 483 F.3d 160, 167 (2d Cir. 2007).

10 Section 152 Ninth provides, in pertinent part, that the National Mediation Board shall resolve "disputes as to who are the representatives of the employees designated and authorized in accordance with the

requirements of this Chapter" and to certify a designated union as bargaining agent. 45 U.S.C. § 152, Ninth. It provides further that "upon receipt of such certification the carrier shall treat with the *representative* so certified as the representative of the craft or class for the purposes of this Chapter." *Id.* (emphasis added). Section 152 Second provides that "all disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between *representatives designated* and authorized so to confer, . . ." 45 U.S.C. § 152, Second (emphasis added).

11 Company Defendants have treated the absence of an implied right of action as a "standing" issue. Plaintiffs in response have argued that they meet the standing requirements of Article III of the Constitution. The parties' approach is not to the point. The issue is whether the plaintiffs, as individual employees, are entitled, under the RLA, to bring suit. Also, that plaintiffs seek Rule 23 class certification does not alter the fact that they are not, even as a group, the certified representative contemplated by the RLA.

12 Plaintiffs' Amended Complaint does not contain a claim under RLA Section 152 First, but they nonetheless move for summary judgment on such a claim and the parties have briefed the claim. For the reasons in the text, even were plaintiffs granted leave to amend, the claim cannot survive.

13 [HN11] Unlike Section 152 Seventh, which is one of the RLA's "explicit status quo requirements," Section 152 First is an "implicit status quo requirement" because it may be invoked "either to ensure effective

compliance with the explicit status quo provisions . . . or to further justify an injunction premised primarily on those provisions." *Northwest Airlines*, 483 F.3d at 167 n.1,167-68 (citations omitted).

14 Although Count V of the Amended Complaint, labeled "Violation of the Railway Labor Act, 45 U.S.C. § 152 (Fourth)," refers to Section 152 Third as well, plaintiffs confirm in their motion papers that they assert no claim under Section 152 Third.

15 Under *IUFA*, this test is one of subject matter jurisdiction over postcertification claims by a union under Section 152 Fourth. *IUFA*, 789 F.2d at 142. Since *TWA*, which recognized subject matter jurisdiction over postcertification claims by unions, the issue has sometimes been treated as one of sufficiency of the claim. *See, e.g., Brotherhood of Locomotive Engineers v. Kansas City S. Ry.*, 26 F.3d 787, 795 (8th Cir. 1994). In either event, the test is the same.

16 Pursuant to the APFA Constitution, the Executive Committee is authorized to interpret the Constitution subject to the approval of the BOD. APFA Const. Art. III §3(L)(10), Art. XI § 1(F). "[T]he Board of Directors may override Executive Committee rejection of a proposed Collective Bargaining Agreement." Art. III § (3)(L)(10). "The Executive Committee shall act as the agent for and on behalf of the Voting Board of Directors, and shall interpret this Constitution, subject to the approval of the Board of Directors." Art. III § (4)(A). "An affirmative vote by a majority of those active members in good standing who return valid ballots shall be required for the passage of any proposed alteration, addition, deletion or amendment."

Art. III § 1(B). "[F]inal control of the APFA shall be vested in the membership." Art. III § (2)(A).

04 CV 1376 (NG)(KAM), 03 CV 4987 (NG)(KAM), 04 CV 634 (NG)(KAM)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NEW YORK

ANNE M. MARCOUX, JILL LINDSAY, KIRSTEN EVANS, CONSTANCE LaMATTINA, ELIZABETH LEE PRICE, JUDITH ALEXANDER, DEBORAH DEAN, CHRISTINA FORD, PATTI GENTRY, LaTONYA K. GILLMORE, JANET GOLD, DALE HAGAR, JULIE HORAN, LOUIS HORTER, CAROL JOHNSON, MOLLY KAIMAN, BEVERLEY KALKHOF, NANCYANNE KELLO, PATRICIA KENNEDY, JANET KIRBY, JOHN KLINE, DOTTIE LONG, KAREN RIVOIRA, LAURENCE E. SALOMON III, DANIEL SANTIAGO, REBECCA SMITH, and DEBORAH WHITTINGTON on Behalf of themselves and all others similarly situated (i.e., the "Class"); CONSTANCE LaMATTINA also on behalf of Subclass I, KIRSTEN EVANS, JILL LINDSAY and ELIZABETH LEE PRICE also on Behalf of Subclass II; DEBORAH WHITTINGTON also on Behalf of Subclass III, and JANET KIRBY also on Behalf of Subclass IV, Plaintiffs,

- against -

AMERICAN AIRLINES, INC., A.M.R. CORPORATION, ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, and JOHN WARD, as President of Association of Professional Flight Attendants, Defendants.

March 28, 2006, Decided

JUDGES: Nina Gershon, United States District Judge.

OPINION BY: Nina Gershon

OPINION

OPINION & ORDER

GERSHON, United States District Judge:

This action is one in a series of lawsuits arising out of defendant American Airlines Inc.'s ("American's") 2003 reorganization and the activities surrounding the negotiation and ratification of the subsequent concessionary agreements with American's employees' unions. Plaintiffs are "former and retired employees of American, members of the defendant union, the Association of Professional Flight Attendants ("APFA"), and current or former members of APFA's Bargaining Unit." Plaintiffs' First Amended Consolidated Class Action Complaint, ¶6 ("Amended Complaint"). They bring this action to set aside what they characterize as an "unlawful and unratified agreement between American Airlines and the labor union representing its flight attendants . . . ." Amended Complaint ¶1. Plaintiffs originally filed three related actions in this court, *Ford v. Association of Professional Flight Attendants, et al.* 03-CV-4987, *Lindsay v. Association of Professional Flight Attendants*, 04-CV-634, and *Marcoux v. American Airlines, Inc.*, 04-CV-1376. The actions were consolidated, and plaintiffs filed the Consolidated Class

Action Complaint on July 12, 2004, and amended it on November 30, 2004. Plaintiffs, who have not yet moved for class certification, identify four subclasses: (1) members of APFA who were entitled to vote on the ratification question, (2) members of APFA who voted in opposition to ratification, (3) members of the class who were furloughed, and (4) members of the class who have retired since the time of the alleged wrongdoing. Unless noted otherwise, plaintiffs' claims are brought on behalf of the class and all subclasses.

In addition to claims against American, the Amended Complaint asserts claims against American's parent company, AMR Corporation ("AMR") (jointly, the "Company Defendants"), as well as claims against APFA and its then-President, John Ward (jointly, the "Union Defendants"). In twenty-two Counts, plaintiffs allege violations of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), and the duty of fair representation ("DFR"), as well as violations of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961 *et seq.* ("RICO"), and state common law.

Company Defendants move to dismiss all of plaintiffs' state claims as preempted by federal law. Union Defendants move to dismiss some of plaintiffs' claims under the LMRDA. All defendants move to dismiss plaintiffs' claims alleging violations of RICO.

BACKGROUND

The allegations in the Amended Complaint, described below, are taken as true for the purposes of defendants' motions to dismiss. [1]

Prior to May 1, 2003, the terms and conditions of plaintiffs' employment were governed by a collective bargaining agreement that had been in effect since November 1, 1998 (the "1998 Agreement"). The 1998 Agreement was duly ratified by union members and was implemented in accordance with the RLA. The amendable date--the earliest time that either party could require the other to enter into negotiations to modify the agreement--for the 1998 Agreement was November 30, 2004. Notwithstanding this date, American approached APFA in or around December 2002 to begin to negotiate voluntary concessions from the flight attendants. American communicated to APFA that it had been experiencing a steady financial decline that was exacerbated by the terrorist attacks on September 11, 2001. Citing a fragile economy, problems in the airline industry, and a large drop in air travel, American asked APFA if it would voluntarily roll back flight attendant pay increases of three percent (3%) that were scheduled for 2003. Shortly thereafter, American announced that it would need "permanent" labor cost savings of $ 1.8 billion per year, of which APFA members were expected to contribute $ 340 million, through a collectively bargained mid-term agreement, called the Restructuring Participation Agreement ("RPA"). American further represented that, to avoid bankruptcy--which carried an additional loss of $ 130 million in cost savings and the furlough of 2,500 more flight attendants than originally contemplated in the initial spending cuts--APFA would need to enter into the RPA with American by March

31, 2003. This deadline was later extended to April 15, 2003.

APFA's constitution requires collective bargaining agreements to be ratified by the membership. The Negotiating Committee presents the proposed agreement to the Executive Committee. If the Executive Committee accepts the agreement, it is presented to the membership for ratification. However, if the Executive Committee rejects the proposed agreement, the Negotiating Committee may present it to the Board of Directors, which has the power to override the Executive Committee's rejection and submit the proposed agreement to the membership for approval. In either event, the membership is entitled to take at least 30 days prior to voting to consider the agreement. The APFA constitution also provides for secret, mail-in, paper balloting and requires that the membership receive the complete changes to any proposed collective bargaining agreement prior to or at the start of the balloting period. An agreement is ratified and thus binding upon the membership once a majority of members in good standing vote in favor of ratification.

To meet American's April 15, 2003 deadline, APFA's Board of Directors passed a resolution on March 19, 2003, suspending the 30-day consideration period prior to the commencement of balloting and permitting the use of electronic ballots. On March 31, 2003, APFA's Negotiating Committee reached agreement with American on the final terms of the RPA, and the Executive Committee recommended presenting it to the APFA membership for ratification. The balloting

was scheduled to begin the first week of April, and end on April 15, 2003.

Throughout the balloting period, APFA maintained a hotline that broadcast various messages purporting to provide updated information to the membership. Plaintiffs allege that these recorded messages served only to present false and misleading information to the APFA members regarding American's economic forecast and to pressure APFA members into ratifying the RPA by stating, among other things, that if the membership rejected the proposal, negotiations would be discontinued. Plaintiffs also suggest that APFA misrepresented its position regarding the members' ability to change their votes by stating that "[APFA] determined that it would be most in keeping with APFA's normal, prescribed voting procedures to not allow a member to change their vote." In fact, as discussed below, APFA members were permitted to change their votes during the one-day extension of voting.

Plaintiffs also allege that defendants engaged in additional activities to induce APFA members to ratify the RPA. Plaintiffs assert that defendants knew that the membership had voted to reject the RPA on April 14th and sought to exert "undue pressure and scare tactics" to get individuals who had not voted to cast ballots in favor of the RPA before the deadline. For example, defendants, among other things, called flight attendants and suggested that, if the RPA were rejected, American would declare bankruptcy; and they held "impromptu" meetings at airports to garner support for the RPA. Plaintiffs assert that these pressure tactics were targeted specifically to those

flight attendants that American and APFA knew had not yet voted. Despite these efforts, on April 15, 2003, the APFA membership voted to reject the RPA, with the final tally being 9,842 against ratifying the RPA, and 9,309 for ratifying the RPA. Subsequently, American and APFA agreed to extend the voting until April 16, 2003.

During the additional day of voting, APFA allowed members who had previously voted to change their votes. Plaintiffs assert that the second round of voting was tainted by illegal electioneering practices which were initiated by American and willfully ignored by APFA. These practices included American and APFA, both subtly and overtly, creating a "frenzy" and "sheer panic" among APFA members by suggesting that American would declare bankruptcy if the RPA were rejected. Defendants' objectionable conduct included placing "pop-up" notices supporting ratification on the flight services' website and providing money or a "minor gratuity" to flight attendants who had voted "No" to ratification in exchange for their changing their votes to "Yes." As a result of these efforts, 1,262 votes were cast, and the membership ratified the RPA, with the final tally being 10,761 votes in favor of ratifying the RPA, and 9,652 votes opposing ratification.

On or around April 17, 2003, it was revealed that American had, despite its precarious financial position, established a Supplemental Executive Retirement Program for its top 45 executives and cash retention bonuses for its top six executives. Upon learning of the bonus programs, defendant John Ward immediately sent a letter to American demanding that the APFA membership be given a "fresh opportunity to vote on

the proposed terms of the restructuring agreement in an untainted environment." Shortly thereafter, Ward sent another letter asserting that American's "material breach of its obligation to disclose all relevant information" necessitated a re-balloting. APFA's Board of Directors formalized this request by passing a resolution on April 22, 2003, directing APFA's National Ballot Committee to conduct a re-ballot.

On or around April 23, 2003, APFA and American began negotiating additional terms to the RPA. The resulting provisions shortened the life of the RPA by eight months, made the collective bargaining agreement amendable in three years, allowed pay increases in the event that American became financially viable and granted the right to substitute another concession in exchange for reinstating a previously-surrendered concession relating to the calculation of flight attendants' salaries. These additional terms, which John Ward maintained were still a "tremendous sacrifice" on APFA's behalf, were added to the RPA on April 25, 2003 by way of a letter agreement which purported to "resolve all disputes" concerning the negotiation, ratification, and effectiveness of the RPA.

The Amended Complaint contains other allegations directed expressly to the RICO claims. These will be addressed below.

DISCUSSION

All defendants having answered, they move, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings dismissing certain claims in the Amended Complaint. A motion for judgment on

the pleadings under Rule 12(c) is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss. *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999). That is, the motion should be granted only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cooper v. Parsky*, 140 F.3d 433, 440 (2d. Cir. 1998). Plaintiffs' factual allegations must be accepted as true, *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), and the court must draw all inferences in favor of plaintiffs. *Thomas v. City of New York*, 143 F.3d. 31, 37 (2d Cir. 1998).

A. State Law Claims

In addition to their claims under the RLA and the DFR, plaintiffs, relying on the same factual allegations which form the bases of their RLA and DFR claims, assert nine state common law claims. American or the Company Defendants move to dismiss the eight claims directed against them. [2] Count Ten alleges that American breached individual employer contracts with its employees by interfering with their rights under RLA Section 2, Third and Fourth, to designate and be represented by bargaining representatives of their choice. *See* 45 U.S.C. § 152, Third and Fourth. Counts Twelve and Sixteen allege that the Company Defendants intentionally interfered with contractual relations between APFA and its members by causing APFA to breach certain provisions of its constitution and bylaws relating to balloting and electioneering practices. Counts Seventeen and Eighteen assert breach of implied contract claims against the Company Defendants based on an implied duty not to interfere with internal union balloting. Counts Nineteen and

Twenty assert unjust enrichment claims against the Company Defendants for allegedly wrongful conduct in obtaining APFA members' approval of the RPA. Finally, Count Twenty alleges that the Company Defendants engaged in fraud and misrepresentation during the RPA negotiations by falsely communicating that American was on the verge of bankruptcy and by failing to disclose material facts relating to its financial state. Like plaintiffs' claims under the RLA and the DFR, all of these state law claims arise out of occurrences during the negotiation and ratification of the collectively bargained RPA. The Company Defendants argue that they are therefore preempted by federal law.

The RLA provides a comprehensive federal regulatory scheme for the resolution of disputes in the rail and air transportation industries. Specifically, the RLA governs the process of negotiation of "agreements concerning rates of pay, rules and working conditions" between carriers and their employees. 45 U.S.C. §§ 152, 156. It protects the right of employees to designate the bargaining representative of their choosing and imposes obligations on carriers and unions with respect to the negotiation of agreements and the settlement of disputes. *See* 45 U.S.C. § 152. Under the RLA, disputes between labor and management are categorized as either "major" or "minor". *See Consolidated Rail Corp. v. Railway Labor Exec. Ass'n., et al.*, 491 U.S. 299, 302, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("*Conrail*").

"Major" disputes seek to create contractual rights; they involve disputes arising out of the formation of collective bargaining agreements or efforts to secure such agreements. *See id.*; 45 U.S.C. §§ 152, Seventh and

156. [3] This category of disputes looks to the "acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945). Major disputes arise only when there is no existing collective bargaining agreement in place or where a party seeks to change the terms of an existing agreement, in effect, formally creating a new agreement. In the event of a major dispute, the RLA requires the parties to undergo a lengthy process of bargaining and mediation. *See Conrail*, 491 U.S. at 302-3. If the bargaining and mediation fails, the parties are encouraged to submit to arbitration. *Id.*

The parties to "minor" disputes, on the other hand, seek to enforce contractual rights arising out of an existing collective bargaining agreement. *See Conrail*, 491 U.S. at 303. Labor disputes are deemed minor disputes if they arise or grow out of "grievances or out of the interpretation and application of agreements concerning rates of pay, rules or working conditions." *Id.; see also Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246, 252-53, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (*"Hawaiian Airlines"*). Under the RLA, parties to minor disputes are required to submit to "compulsory and binding arbitration before the National Railroad Adjustment Board" or "before an adjustment board established by the employer and the unions representing the employees." *See Conrail*, 491 U.S. at 303-4. The adjustment boards have exclusive jurisdiction over minor disputes, and judicial review of any arbitral decision is limited. *See id.* at 304.

Here, plaintiffs' state law claims attack Company Defendants' conduct while negotiating and pursuing

ratification of the collectively bargained RPA. While couched in state law terminology, all of these claims rely on the identical factual allegations supporting the RLA claims and therefore are "major" disputes under the RLA. Under the preemption doctrine set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), state law claims are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by federal labor law. *See Belknap v. Hale*, 463 U.S. 491, 498, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983). Although *Garmon* preemption first arose in the context of the National Labor Relations Act ("NLRA"), and *Garmon* itself concerned the primary jurisdiction of the National Labor Relations Board ("NLRB"), the *Garmon* preemption doctrine has been extended to conduct governed by the RLA. *See Bhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 369, 383-84, 89 S. Ct. 1109, 22 L. Ed. 2d 344 & n.19 (applying *Garmon* preemption principles while noting that "there is . . . no administrative agency equivalent to the NLRB with jurisdiction over railway labor disputes"). Thus, state claims that attempt to regulate conduct protected or prohibited by the RLA are preempted. In the RLA context, as in cases arising under Section 301 of the Labor Management Relations Act, 1947, ("LMRA"), as amended, 29 U.S.C. §§ 141 *et seq.*, preemption is driven by the need for uniform federal regulation of labor-management relations. *See Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1169 (4th Cir. 1985)(finding that "the risk of state interference with the effective administration of national labor policy is present [in the RLA context] even though the exclusive jurisdiction of the arbitrator is not at issue"); *cf. Allis-Chalmers Corp. v. Lueck*, 471

U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985) (noting, in a Section 301 case, that interests in interpretive uniformity and predictability require that labor-contract disputes be resolved by reference to federal law).

In this case, there is no dispute that American owed plaintiffs certain statutory duties under the RLA and that APFA had a duty of fair representation with respect to plaintiffs. [4] There is also no dispute that, under the RLA, hybrid DFR claims may be asserted against an employer and that such claims are governed by federal law. *See Czosek v. O'Mara*, 397 U.S. 25, 29-30, 90 S. Ct. 770, 25 L. Ed. 2d 21 (1970). Counts One through Nine in the Amended Complaint, which defendants do not move to dismiss, allege RLA and DFR or hybrid DFR violations based on all defendants' conduct during the negotiation for and ratification of the RPA. For example, plaintiffs challenge defendants' actions in "extending the balloting to April 16, 2003," "denying the flight attendants the opportunity to cast their ballots in a calm atmosphere," "deliberately creating a firestorm of fear and frenzy," and "failing to assure the integrity of the balloting process and the accuracy of any tallies." Plaintiffs' state law claims assert common law theories based on identical conduct.

Garmon carved out two narrow exceptions to the preemption doctrine which recognize that major disputes are not preempted where state regulation of conduct "deeply rooted in local feeling and responsibility" or matters of "merely peripheral concern" to federal labor relations law are at stake. *Garmon*, 359 U.S. at 243-44. These exceptions highlight the court's responsibility "to determine the scope of the

general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25 et al.*, 430 U.S. 290, 297, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977). Here, none of the challenged state law claims falls within either exception. Rather, each goes to the heart of the federal interest in ensuring the fair and orderly negotiation of working conditions by carriers and employees. The interests asserted by the plaintiffs are precisely those protected by federal labor law, not interests "deeply rooted in local feeling and responsibility." *See Bensel v. Allied Pilots Ass'n.*, 387 F.3d 298, 321-22 (3d Cir. 2004). "Far from being of only 'peripheral concern' to federal labor law, plaintiffs' state law claims strike at the core of conduct and relationships governed" by the RLA. *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 506 (E.D.N.Y. 2003).

Plaintiffs attempt to avoid preemption as to some of their state law claims by arguing that they do not arise from the effort to achieve a collectively bargained agreement, but rather arise from the breach of separate, individual contracts. Plaintiffs claim the existence of two types of independent contractual obligations. Count Twelve--which is alleged only on behalf of members of the class who were entitled to vote on ratification--and Count Sixteen assert that the Company Defendants interfered with the plaintiffs' contractual relations with APFA as set forth in the union's constitution and bylaws. Counts Ten, Seventeen and Eighteen rely on the RLA itself. In Count Ten, plaintiffs argue that, since Section 2, Eighth of the RLA provides that the Third, Fourth, and Fifth paragraphs

of Section 2, are part of the contract of employment between the carrier and each employee, "to the extent that American has violated Section 2, Third and Fourth of the RLA, it has also violated its contracts of employment." [5] Counts Seventeen and Eighteen allege breaches of implied contracts between the Company Defendants and the flight attendants not to interfere with union balloting procedures. On oral argument, plaintiffs acknowledged that these implied contracts also arise solely from obligations imposed on the carrier under the RLA.

First, as discussed earlier, plaintiffs are alleging major disputes as all of these claims deal explicitly with alleged misconduct by American or the Company Defendants during the negotiation and ratification of the RPA, and these claims are in essence no different from their RLA and hybrid DFR claims. [6] Second, plaintiffs' allegations do not amount to claims of individualized contracts protected by state law. The rights set forth in the RLA, which plaintiffs allege create implied individual contracts, are governed by federal law and are rights that employees have during the course of their effort to obtain a collectively bargained agreement. Such rights are wholly within the purview of the RLA, and thus any state law claims alleging violations of those rights are assuredly preempted.

Plaintiffs' reliance on *Hawaiian Airlines* to argue that these so-called individual claims should be viewed as not subject to preemption obfuscates the difference between federal preemption over major disputes under the RLA, which is at issue here, and federal preemption of disputes regarding the interpretation of collectively

bargained agreements, which is not at issue, but was the subject of *Hawaiian Airlines*. The defendant in *Hawaiian Airlines* argued that the plaintiff's claim under a state whistleblower statute could be heard only by the RLA's arbitral boards and thus was preempted. The Supreme Court disagreed on the grounds that the only source of the claimed rights was state law and not the collectively bargained agreement and that interpretation of the collectively bargained agreement was not required. In essence, the state law claims were not minor disputes and therefore could proceed in state court. Nothing in the Supreme Court's decision suggests that major disputes regarding the negotiation and ratification of collectively bargained agreements can be heard as state law claims.[7]

In sum, the eight state law claims against American or the Company Defendants are dismissed as preempted by federal law.

B. LMRDA Claims

Counts Thirteen, Fourteen and Fifteen assert claims under Section 411 of the LMRDA, 29 U.S.C. §§ 411(a)(1), which provides that:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Defendants seek dismissal of Counts Fourteen and Fifteen, and parts of Count Thirteen, on the ground that the court lacks jurisdiction to hear the claims.

In *Members for a Better Union v. Bevona*, 152 F.3d 58 (2d. Cir. 1998), the Court of Appeals for the Second Circuit held that there is no jurisdiction unless the "specific allegations in the complaint reflect an infringement of rights protected under Title I of the LMRDA." In *Bevona*, union members sought to enjoin certain voting procedures mandated by the union leadership regarding a vote on proposed amendments to the union's constitution. Specifically, plaintiffs charged that the union wrongfully refused to publish the proposed amendments in the union newspaper, scheduled the vote at times that did not accommodate all employment shifts, and published the executive committee's negative recommendation in the union newspaper without giving plaintiffs the opportunity to present an opposing view. The Court found that, although the union's actions may have dissuaded some members from voting, there was no discriminatory denial because the "same detriments applied equally to the class." *Id.* at 65. Under *Bevona*, then, mere allegations of unfairness do not state a claim under Section 411(a)(1). Rather, to be within the court's jurisdiction under that Section, plaintiffs' claims must allege that APFA granted rights to some of its members, but denied those same rights to others, in order to carry out a discriminatory goal.

Plaintiffs have satisfied the jurisdictional threshold with respect to the claim alleged in Count Thirteen. [8] Defendants do not dispute that the language of paragraph 312 of Count Thirteen, which alleges that

"the Union violated 29 U.S.C. § 411 by permitting members to change their votes from 'No' to 'Yes,' but not vice versa," meets the *Bevona* test. Defendants recognize that this allegation meets the jurisdictional prerequisite because it pleads that the union favored certain of its members (those voting in opposition to ratification), by granting them the right to change their vote to "yes," but denied that same right to those who had voted in favor of ratification and wanted to change their votes to "no." In essence, this alleged denial of voting rights sought to ensure ratification of the RPA, by discriminating against those employees in opposition to ratification.

Defendants nonetheless ask the court to treat the allegations of Count Thirteen as three separate claims in order to obtain dismissal of the other two "claims," namely, paragraph 310, which alleges that APFA "violated 29 U.S.C. § 411 by reopening a vote that was already officially closed so that there could be no extended voting," and paragraph 311 which alleges that APFA permitted members to change their votes during the extension period. Defendants' application to dismiss individual sentences within Count Thirteen is denied. A claim is not to be dissected sentence by sentence. It is enough, at this stage of the litigation, that Count Thirteen, as noted above, states a claim under the LMRDA.

Count Fourteen alleges, on behalf of members of the class who voted in opposition to ratification, that the Union Defendants improperly used the National Balloting Committee's resources to distribute only information in support of ratification, and thereby denied those opposed to ratification the same privileges

enjoyed by the "yes" voters. The Second Circuit rejected a similar argument in *Bevona*--where the union had refused to publish opposing views in the union newspaper--on the ground that, even though the information provided to the membership was one-sided, all of the membership received it. Therefore, the court held, no individual was granted rights or information that was discriminatorily denied to others. *See Bevona*, 152 F.3d at 58.

Finally, Count Fifteen alleges, on behalf of all members entitled to vote on the ratification question, that APFA wrongfully dispensed with the membership's vote by "substituting" for it the Board of Directors' vote, thereby effectively denying to the union members their rights and privileges as voting members of the union. Plaintiffs urge the court to consider this claim in light of *Smith v. Bowers*, 337 F.Supp.2d 576 (S.D.N.Y. 2004). There, the ballots of three local unions were disqualified after the locals allowed their members to vote after the time that was designated by union leadership to end balloting. Although the votes of these locals were originally counted in the national totals, the national leadership disqualified the votes. The Court held that, under *Bevona*, the jurisdictional threshold was met because plaintiffs undisputedly alleged disparate treatment by the national union leadership, in that the votes of certain of the unions' members (those who voted before the end of balloting) were counted, while others (those of the three locals) were not. *Id.* at 588. In contrast, here, no such disparate treatment within the voting class is alleged. Rather, since the alleged denial of voting rights extended across the entire membership, regardless of whether members voted for or against ratification of the RPA, no members were

granted any greater or lesser privileges than others. *See Local Unions 20. v. United Bhd. of Carpenters & Joiners of Am.*, 223 F. Supp. 2d 491, 498 (S.D.N.Y. 2002).

In sum, the court has jurisdiction over Count Thirteen, but not over Counts Fourteen and Fifteen, and Counts Fourteen and Fifteen are dismissed.

C. RICO Claims

In Count Twenty-two, plaintiffs assert as to all defendants both a substantive violation of 18 U.S.C. § 1962(c) and a conspiracy, under 18 U.S.C. § 1962(d), to violate Section 1962(c). 18 U.S.C. § 1962(c) makes it unlawful, in relevant part,

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See* 18 U.S.C. § 1961(4). Plaintiffs must allege a pattern of "racketeering activity" consisting of "at least two predicate acts . . . which amount to or pose a threat of continued criminal activity." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178 (2d. Cir. 2004). "Racketeering activity" is defined to include "any act which is indictable under" 18 U.S.C. § 1343 (wire fraud), 18

U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1951 (the Hobbs Act), 18 U.S.C. § 1952 (the Travel Act), and 29 U.S.C. § 186 (restrictions on payments and loans to labor organizations). *See* 18 U.S.C. 1961(1)(B). Under the mail and wire fraud statutes, "any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," which involves use of the mails or wire is indictable. *See* 18 U.S.C. §§ 1341, 1343. Plaintiffs here rely upon allegations of thousands of acts said to violate the aforementioned statutes. Defendants principally argue that, despite the number of alleged predicate acts, plaintiffs fail to plead the required pattern of racketeering.

In the Amended Complaint, plaintiffs greatly expand their original RICO claims. They allege that, beginning as early as December of 2002 and continuing through at least September of 2004, American and APFA formed an association-in-fact for the dual purposes of (1) devising and carrying out a scheme to fraudulently induce American's flight attendants to enter into the RPA and (2) devising and implementing the strategy allowing the APFA Board of Directors to substitute its own approval of the RPA for the decision of the APFA membership. Plaintiffs categorize defendants' alleged wrongful activity in furtherance of these plans into four "implementing schemes." As with the facts discussed above, any additional allegations described below are taken as true for purposes of the pending motions.

First Implementing Scheme

In mid-February 2003, American sought to scare APFA members into voluntarily relinquishing current wages

and benefits packages by falsely asserting that American was suffering from a financial crisis arising, in part, from labor costs. Specifically, plaintiffs allege, APFA endorsed American's false statements, even though they had access to American's books and records, which should have indicated that American's economic outlook was more positive than previously communicated. Plaintiffs also allege that APFA reiterated American's false representations to the membership, with knowledge that the representations were false. Each telephonic message, union publication, and/or American publication that contained the allegedly false representations, and was communicated via mail or wire to the APFA members, is alleged as a separate predicate act under RICO.

Second Implementing Scheme

From April 15 to April 16, 2003, American and APFA allegedly used "coercion, vote rigging and, ultimately diktat or decree" to aggressively pursue votes in favor of ratification during the one-day extension of voting on the RPA ratification question. Specifically, plaintiffs assert that American and APFA formed "get-out-the-vote" squads to aggressively pressure members either to vote in favor of ratification or, if they had already voted "no," to change their votes to "yes." Plaintiffs also allege that American and APFA had insider knowledge as to whether and how members had voted on the ratification question. Plaintiffs contend that this alleged coercion and extortion violated the Hobbs and Travel Acts and, therefore, are predicate acts under RICO. Plaintiffs also allege that American, in effect, paid certain flight attendants a "gratuity" to vote, or arranged or paid for them to call in their vote to the

American Arbitration Association, in violation of 29 U.S.C. § 186, with each payment constituting a predicate act under RICO.

Defendants are also charged with meeting, via telephone conference, between April 22 and April 23 of 2003, to devise and implement the strategy of causing APFA's Board of Directors to usurp the flight attendants' power to hold another vote on the ratification question. Plaintiffs claim that, when John Ward executed the letter agreement between American and APFA, the defendants effectively eliminated the members' opportunity to hold another vote regarding the proposed RPA. Plaintiffs allege that defendants violated the mail and wire fraud statutes by posting the Board of Director's resolution (which was in furtherance of the substitution scheme) on APFA's website and subsequently mailing it to the APFA membership.

Third Implementing Scheme

Defendants allegedly sought to continue the life of the RPA by ensuring that individuals associated with the "Ward Regime" remained in office. To this end, APFA and John Ward worked together to engage in deception and vote manipulation to re-elect Ward as President in the APFA election scheduled to occur on January 29, 2004. After a runoff between the final two candidates, John Ward and Tommie Hutto-Blake, APFA announced that Ward had won the election by five votes. However, in approximately mid-August of 2004, after investigating and reinstating certain disqualified votes, the Department of Labor determined that Tommie Hutto-Blake had actually won the January 29,

2004 election. APFA subsequently installed her as President. Plaintiffs allege that APFA "manufactured a majority" and, with knowledge of the falsity of the results, wrongfully announced that John Ward had won on January 29, 2004. Plaintiffs contend that each time the erroneous results were published, or either telephonically or electronically disseminated, defendants violated the mail and wire fraud statutes.

Fourth Implementing Scheme

In May of 2004, allegedly in furtherance of its plans to "sanction practices in which it was already engaged without constitutional authority" and to "further the goals of the criminal enterprise," the Union Defendants proposed several amendments to the APFA constitution to its membership. The amendments sought to: (1) allow union leadership to appoint members of the Negotiating Committee; (2) grant the Board of Directors wider discretion in deciding voting procedures; (3) codify the "voter eligibility" rule that had been used in determining eligibility in the January 29, 2004 National Officer election; (4) alter the number and composition of the Balloting Committee, and (5) limit the membership's ability to initiate the process of proposing amendments to the APFA constitution. On August 11, 2004, APFA's membership voted the amendments down. Plaintiffs claim that, although the proposed amendments were not in and of themselves criminal, they were related to pursuing the goals of the criminal enterprise. Therefore, each mailing in furtherance of the proposed amendments constituted an act of mail fraud under 18 U.S.C. § 1341.

Pattern of Racketeering Activity

Plaintiffs have failed to plead facts establishing a RICO pattern. Although a pattern requires only a minimum of two predicate acts, plaintiffs must also show that the predicates are (1) related and that (2) they amount to or pose a threat of continuing criminal activity. *See Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F.3d 91, 97 (2d Cir. 1997); *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir. 1989), cert. denied, 493 U.S. 811, 110 S. Ct. 56, 107 L. Ed. 2d 24 (1989). Predicate acts are related if they "have the same or similar purposes, results, participants, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics, and are not isolated events." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Continuity is established by facts demonstrating either an "open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." *See GICC Capital Corp. v. Tech.Fin. Group, Inc.*, 67 F.3d 463, 466 (2d Cir. 1995).

1. Relatedness

To begin with, plaintiffs' First, Second and Third Implementing Schemes relate to the single overarching goal of inducing the flight attendants to enter into the RPA, and ensuring the continuation of the RPA. Plaintiffs' characterization of the facts as setting forth three separate schemes is artificial. *See Schlaifer Nance & Co.*, 119 F. 3d at 98 ("Courts must take care to ensure that plaintiff is not artificially fragmenting a singular act into multiple acts simply to invoke RICO.").

The Fourth scheme, which pertains to the internal governance of the Union, alleges no conduct by the Company Defendants, is unrelated to the goal of defrauding the flight attendants into ratifying the RPA and cannot be fairly viewed as a means of continuing the criminal enterprise. It therefore is not properly included in the RICO pattern. *See Schlaifer Nance & Co.*, 119 F.3d at 97 (schemes unrelated to pattern of racketeering activity where goals are unrelated to the underlying enterprise). Therefore, the Fourth scheme--and its alleged underlying predicate acts-- are not properly considered in analyzing whether the continuity requirement has been met.

2. Continuity

Treating the First through Third implementing schemes as related, plaintiffs do not meet RICO's continuity requirements. "Closed-ended" continuity is demonstrated by a "series of related predicates extending over a substantial period of time" *Cofacredit S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 242 (2d Cir. 1999). The Second Circuit has indicated that a minimum of two years is required to show "a substantial period of time." *Id.* ("Since the Supreme Court decided *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), this Court has never held a period of less than two years to constitute 'a substantial period of time'"). Thus, in this Circuit, closed-ended continuity is primarily a temporal concept, even though courts may weigh such other factors as "the number and variety of acts, the number of participants, the number of victims and the presence of separate schemes." *See GICC Capital Corp.*, 67 F.3d at 467.

The First through Third schemes extended from mid-February of 2003 through January 29, 2004, indicating that the criminal enterprise continued for approximately eleven and a half months. (Even if the scheme could be treated as beginning in December of 2002 and continuing until action by the Department of Labor, it lasted only until mid-August of 2004, or a period of twenty months). [9] Indeed, as to the Company Defendants, who are not alleged to have participated in the Third or Fourth schemes, the enterprise lasted only from mid-February of 2003 through April 25, 2003. This falls far short of the Second Circuit's two-year minimum requirement. Plaintiffs do not dispute that their allegations do not meet the two-year requirement, but argue that the existence of multiple schemes and thousands of predicate acts of mail and wire fraud overcome this deficit. However, as noted above, plaintiffs are artificially fragmenting what is essentially one alleged criminal purpose--inducing the flight attendants to ratify the RPA--into multiple schemes. Thus, without more, merely alleging a large number of mailings and calls is insufficient to meet plaintiffs' burden. Plaintiffs' speculative assertion that discovery may establish that defendants' first predicate act occurred at least three months earlier than alleged does not overcome the deficiency of the Amended Complaint.

Plaintiffs alternatively argue that they have sufficiently pled an open-ended pattern of racketeering activity. Even if the court were to consider all four schemes to be related, plaintiffs offer no facts indicating that a threat of continuing criminal activity exists beyond the period during which the predicate acts were performed. *See De Falco v. Bernas*, 244 F.3d 286, 323 (2d Cir. 2001).

Open-ended continuity requires an assessment of "the nature of the RICO enterprise, and of the predicate acts." *Cofacredit S.A.*, 187 F.3d at 242. Where, as here, defendants are operating legitimate businesses, plaintiffs are required to plead facts indicating that there existed the threat of continued criminal activity in furtherance of defendants' plans. *See GICC Capital Corp.*, 67 F.3d 463 at 466. For example, in *Cosmos Forms v. Guardian Life Ins. Co. of Am.*, 113 F.3d 308 (2d Cir. 1997), defendants, who were salespersons in two separate companies, engaged in a scheme of inflating prices on paper orders for personal profit. The Court of Appeals found that plaintiffs met the open-ended continuity requirement because defendants had committed the unlawful acts regularly for fifteen months and only stopped because they had been caught by their respective companies. In contrast, plaintiffs here have not demonstrated such an ongoing threat of criminal activity. The alleged criminal goal, the fraudulent ratification of the RPA, was accomplished on April 25, 2003. Ward's challenger assumed office as President of APFA in mid-August of 2004, and the proposed constitutional amendments were voted down by the APFA membership on August 11, 2004. *Id.* (finding that even if alleged acts were presumed to be true, it was clear that the scheme was "inherently terminable" and thus could not have continued). [10]

RICO Conspiracy

Finally, plaintiffs claim that all defendants conspired to violate the substantive provisions of 18 U.S.C. 1962(c). Since plaintiffs' substantive RICO claim fails for lack of sufficient pattern allegations, the RICO conspiracy

claim cannot survive. *See Cofacredit, S.A.*, 187 F.3d 229, 245 (2d Cir. 1999).

CONCLUSION

For the reasons discussed above, the Company Defendants' motion to dismiss Counts Ten, Twelve, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty one and Twenty-two is granted. The Union Defendants' motion to dismiss is granted as to Counts Fourteen, Fifteen and Twenty-two, and denied as to Count Thirteen.

SO ORDERED.

Nina Gershon

United States District Judge

Dated: March 28, 2006
Brooklyn, New York

1 Plaintiffs have not contested the Company Defendants having attached various documents, such as the Restructuring Participation Agreement and the union's constitution, which are referred to in the Amended Complaint, to their motion. The attachment of such documents does not convert this motion to one for summary judgment. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). In any event, it was unnecessary to rely on anything other than the Amended Complaint itself in resolving the motions.

2 Count Eleven, brought on behalf of members of the class who were entitled to vote on ratification, alleges

that APFA breached a contract (the APFA constitution) with its members by engaging in unlawful balloting and negotiating activity. APFA has not moved to dismiss this claim.

3 Section 2, Seventh states that no carrier "shall change the rates of pay, rules, or working conditions of its employees...except in the manner prescribed in such agreements," or through the mediation procedures established in Section 6.

4 The duty of fair representation, although not an explicit statutory requirement, has been fashioned judicially as a corollary to "the exclusive agent's statutory authority to represent all members of a designated unit" and requires the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74-77, 111 S. Ct. 1127, 113 L. Ed. 2d 51; *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). Because federal labor law defines the scope of the duty of fair representation a union owes to its members, state law claims that are "mere refinements" of the duty of fair representation also are preempted. *See Peterson*, 759 F.2d at 1170.

5 Section 2, Third provides, in relevant part, that "representatives ... shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in

its choice of representatives . . . ." 45 U.S.C. § 152, Third.

Section 2, Fourth provides, in relevant part, that "employees shall have the right to organize and bargain collectively through representatives of their own choosing ... no carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice . . . ." 45 U.S.C. § 152, Fourth.

6 Counts Twelve and Sixteen assert in effect hybrid RLA/DFR claims against American and, just like the other state law claims against the Company Defendants, are predicated on conduct surrounding the negotiation and ratification of the RPA. The hybrid RLA/DFR claims against American are, therefore, major disputes that are preempted under *Garmon*. *See Cooper v. TWA Airlines, LLC*, 274 F.Supp.2d 231, 248-49 (E.D.N.Y. 2003); *Cooper v. TWA Airlines, LLC*, 2005 U.S. Dist. LEXIS 41007, 2005 WL 3863435 (E.D.N.Y. July 18, 2005).

7 Plaintiffs' reliance on *Sullivan v. American Airlines*, 424 F.3d 267 (2d Cir. 2005), is also misplaced. There, the Court of Appeals for the Second Circuit recognized that, under *Hawaiian Airlines*, state law claims that are disguised minor disputes are preempted by the RLA. *Sullivan*, 424 F.3d at 273. *Sullivan* held, however, that, even where state law claims qualify as minor disputes under the RLA, and even though a defendant can assert preemption in the state court as a defense, the misnamed jurisdictional doctrine of "complete preemption" does not create federal

jurisdiction authorizing removal of the action from state court to federal court. *Sullivan* provides no support for plaintiffs' position here.

8 Count Thirteen is alleged only on behalf of members of the class who cast ballots in opposition to ratification.

9 Even if the Fourth Implementing Scheme were included, plaintiffs allege an enterprise lasting either eighteen months (from mid-February 2003 through August 11, 2004), or at most, twenty months (from-mid December 2002 through August 11, 2004). In either event, plaintiffs do not reach the two-year minimum.

10 Defendants assert various other arguments in support of dismissing the RICO claims. Because plaintiffs have failed to plead a pattern of racketeering activity, it is unnecessary to separately consider any of these arguments.

Filed 2/2/04
CV 03-8305 ABC (PLAx)

UNITED STATES DISTRICT COURT CENTRAL DISTRICT of CALIFORNIA WESTERN DIVISION
JILL LINDSAY,
Plaintiff,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, et al.,
Defendants.

ORDER RE: (1) PLAINTIFF'S MOTION TO REMAND ACTION To STATE COURT and (2) DEFENDANTS' MOTION TO CHANGE VENUE

The instant motions to remand[1] and to change venue came on for hearing on February 2, 2004. Having carefully considered the materials submitted by the parties, argument of counsel and the case file, and for the reasons set forth below, Plaintiff's Motion to Remand is DENIED and Defendants' Motion to Transfer Venue is GRANTED.

I. FACTUAL AND PROCEDURAL HISTORY

Jill Lindsay ("Plaintiff") is a flight attendant employed by American Airlines, Inc. ("American"), a wholly-owned subsidiary of AMR Corporation ("AMR"). See Notice of Removal of Defendant Association of Professional Flight Attendants ("APFA," and together with MR,"Defendants") Par. 7. APFA is the exclusive collective bargaining representative for American's

flight attendants. Id. Plaintiff filed the instant case on behalf of all APFA members affected by the actions of APFA and AMR to set aside a collective bargaining agreement (the "CBA") between American and APFA, which Plaintiff alleges was illegal, not duly executed and not validly approved under APFA's constitution. See First Amended Class Action Complaint ("FAC")Pars. 26, 69,70-72.

On September 19, 2003, Plaintiff filed the instant action in Los Angeles County Superior Court. On October 15, 2003, the FAC was filed, alleging causes of action for (1) breach of contract, (2) breach of fiduciary duty, (3) conspiracy to breach fiduciary duty, (4) breach of implied covenant of good faith and fair dealing, (5) breach of the duty of fair representation, (6) interference with prospective economic advantage, (7) interference with contract, (8) declaratory relief and (9) injunctive relief. On November 14, 2003 APFA removed the case to this Court. On the same date, AMR filed a notice of joinder in APFA's notice of removal and set forth additional grounds for the exercise of the Court's removal jurisdiction.

On January 5, 2004, Plaintiff filed her notion to remand and Defendants filed their joint motion to change venue. Plaintiff filed her opposition to Defendants' motion on January 14, 2004, to which Defendants replied on January 21, 2004. Defendants Opposed Plaintiff's motion on January 12, 2004. Plaintiff failed to file a reply in support of her motion to remand.

II. LEGAL STANDARDS

A. Motion to Remand

"The threshold requirement for removal under 28 U.S.C. § 1441 is a finding that the complaint contains a cause of action that is within the original jurisdiction of the district court," Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998). A "defendant bears the burden of actually proving the facts to support jurisdiction." Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992) citing Garza v. Bettcher Indus., Inc., 752 F, Supp, 753, 763 (E.D. Mich. 1990)). Facts presented by the defendant are evaluated in light of the "'strong presumption' against removal jurisdiction."' Id. at 566 (quoting St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 258-89 (1938)). A defendant must show by a preponderance of the evidence the facts that support jurisdiction where challenged by the plaintiff. See Sanchez v. Monumental Life Insurance Co., 102 F.3d 398, 404 (9th Cir. 1996).

B. Motion to Change or Transfer Venue

1. First-to-File Rule.

The "first-to-file" rule allows a district court to transfer, stay or dismiss an action when a similar complaint has been filed in another federal court. Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623 (9th Cir.1991). In applying this rule, a court looks at three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the issues. Alltrade, 946 F.2d at 625-26; Pacesetter Systems, Inc. v. Medtronic Inc., 678 F.2d 93, 95 (9th Cir,1982). The first-to-file rule "should not be disregarded lightly." Church of Scientology v. U.S. Dep't of the Army, 611 F.2d 738, 750 (9th Cir.1979) .

2. 28 U.S.C. 1404 a Motion to Transfer Venue.

When considering a motion to transfer pursuant to 28 U.S.C. §1404(a), a court must consider (1) the convenience of parties, (2) the convenience of witnesses and (3) the interest of justice. The court may also look at other practical considerations including judicial economy, access to proof, reach of subpoena power, relative docket congestion and familiarity with governing state law. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 842-43 (9th Cir. 1984). The burden is on the moving party to demonstrate that transferring the case is appropriate. Id.

III. DISCUSSION

A. Plaintiff's Motion to Remand.

Plaintiff bases her motion to remand on the grounds that (1) the claims in the FAC are not inextricably linked with the parties' CBA and (2) that the outrageous conduct exception to the Railway Labor Act ("RLA") applies here and requires that the case be heard in state court. Defendants oppose Plaintiff's motion, arguing that (1) Plaintiff's claims are governed exclusively and completely preempted by federal law and are thus properly in federal court, (2) Plaintiff's remand argument is grounded on case law that is inapplicable to the claims presented in the FAC and (3) Plaintiff cannot avoid removal by adding an "outrageous conduct" component to her claims.

1. Plaintiff's Claims are Preempted by Federal Law.

In her motion, Plaintiff contends that the instant case is

based on state law, that the issues are not "inextricably intertwined" with the CBA and that interpretation of the CBA is not required. In Plaintiff's view, purely factual questions about an employee's or employer's conduct or motives do not require interpretation of a CBA. For support, Plaintiff relies on Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) and Lingle v. Norge, Division of Magic Chef, Inc., 486 U.S. 399 (1988). Plaintiff claims that the FAC involves state tort claims which do not require interpretation of the CBA, because issues involving the validity of the agreement itself do not require the interpretation of that agreement.

Defendants oppose Plaintiff's motion, arguing that the issues raised in Plaintiff's FAC are governed exclusively by federal law and are completely preempted. According to Defendants, Plaintiff's claims raise issues encompassed within the duty of fair representation, which are measured exclusively by federal labor law standards. A claim that a union has breached its duty of fair representation presents a federal question over which federal courts have subject matter jurisdiction. See Peters v. Burlington Northern R. Co., 931 F.2d 534, 537 (9th Cir. 1991). Defendants rely on Steele v. Louisville & Nashville RR, 323 U.S. 192, 201-203 (1944) for their contention that APFA's duty of fair representation arises out of and is governed by the RLA, and serves as a counterbalance to the exclusive authority given to APFA to represent American's flight attendants concerning the terms and conditions of their employment. According to Defendants, where a claim implicates the duty of fair representation, a district court possesses federal question jurisdiction even if characterized as a state law

claim. See BIW Deceived v. Local S6 Indus. U. of Marine and Shipbuilding Wrkrs., 132 F.3d 824, 831-832 (1st Cir. 1997).

Defendants contend that all of Plaintiff's claims implicate and/or fall within the ambit of the duty of fair representation because they relate to the negotiation, ratification and implementation of the CBA. Defendants urge the Court to reject Plaintiff's attempt to avoid federal jurisdiction by artfully pleading her federal duty of fair representation claims, arguing that attacks on the validity of a collective bargaining agreement present a federal question under the RLA, citing Int'l Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 691 (1963).

Defendants also argue that application of state law to Plaintiff's claims would conflict with the established policy of uniform application of federal law in federal labor law matters, a articulated in Central Airlines, id. at 591-692, in which the Supreme Court indicated that uniformity is essential in adjudicating challenges to the validity, interpretation' and enforceability of an RLA CBA.

Finally, Defendants distinguish Norris and its progeny, which Plaintiff relies upon in support of her contention that her claims are not preempted. Defendants argue that these eases are inapplicable, as they addressed issues having nothing to do with the collective bargaining relationship, the collective bargaining process, the validity of collective bargaining agreements or representational duties imposed upon unions by the duty of fair representation. For the foregoing reasons, Defendants urge the Court to deny

Plaintiff's motion to remand.

Having reviewed the parties' arguments and the relevant law, the Court finds that Plaintiff is not entitled to remand because her claims are preempted by federal law. First, as Defendants aptly note, one of Plaintiff's causes of action is for breach of APFA's duty of fair representation, and the breach of this duty is implied in her other causes of action as well. Federal district courts have subject matter jurisdiction over unfair representation claims arising under the RLA. See Peters, 931 F.2d at 587. "[S]tate law is preempted whenever a plaintiff's claim invokes rights derived from a union's duty of fair representation." BIW Deceived, 132 F.3d at 830. Second, remand of the case would be at odds with the RLA's goals of uniformity in adjudicating the validity and enforceability of collective bargaining agreements. Plaintiff challenges the validity of the CBA based on alleged improprieties in connection with negotiations. To allow the FAC to proceed in state court would thwart the Congressional goals in ensuring the uniform interpretation of the RLA. Third, Defendants are correct that neither Norris nor Lingle supports Plaintiff's motion to remand. In Norris, the Supreme Court held that a state law cause of action is not preempted by the RLA if it involves rights and obligations existing independent of a collective bargaining agreement. The Supreme Court ruled in Lingle that the LMRA did not preempt an employee's state tort claim far retaliatory discharge where interpretation of the collective bargaining agreement was not required. Unlike Norris and Lingle, both of which involved state law wrongful discharge claims, the instant case deals directly with the collective bargaining relationship, the collective bargaining

process, the validity of a collective bargaining agreement and the representational duties imposed upon Defendant APFA by the RLA's duty of fair representation, issues which are clearly governed by federal law. For the foregoing reasons, the Court DENIES Plaintiff's motion to remand, finding that her claims are preempted by federal law.

2. Plaintiff is Not Entitled to Remand Based on, Her outrageous Conduct Argument.

Plaintiff contends that even if the Court rules that her claims are preempted, she i still entitled to remand under the outrageous conduct exception to the general rule of RLA preemption, See Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1979); McCann v. Alaska Airlines, Inc., 758 F.Supp. 559, 563 (N.D, Cal. 1991). In Plaintiff's view, Defendants exceeded all acceptable bounds of behavior by (1) engaging in willful manipulation of the system, (2) deciding not to deal with designated union representatives but instead dealing directly with individual voting members of the union and coercing and intimidating the individuals they contacted in order to obtain their approval vote for the CBA. Based on these actions, Plaintiff asserts that the outrageous conduct exception warrants remand of this case.

In their opposition, Defendants point out that the alleged physical threats and intimidation of which Plaintiff claims are not in the FAC, and therefore cannot form the basis of her outrageous conduct argument. Furthermore, Defendants argue that the application of the outrageous conduct exception is limited to cases where there is little risk that the state

cause of action would interfere with the effective administration of national labor policy. Defendants also cite Farmer, 430 U.S. at 298 to support their position. According to Defendants, where the central claims are directed at the manner in which a union and employer negotiated, ratified or implemented a nationwide collective bargaining agreement and the relief sought is the invalidation of that agreement, the outrageous conduct exception does not apply.

The Court finds that Plaintiff is not entitled to rely on the outrageous conduct exception to federal preemption. The outrageous conduct exception is applied in cases where the "conduct was a merely peripheral concern of federal law" and affects "interests which [are] deeply rooted in local feelings and responsibility." See McCann, 758 F. Supp. at 563, citing Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir. 1978). The exception has been held to apply in cases where an airline employee brought suit against her employer for false imprisonment, slander, assault and intentional infliction of emotional distress (McCann); and where a union member alleged an ongoing campaign of public harassment and verbal abuse that caused the plaintiff to suffer "grievous mental and emotional distress a well as great physical damage" (Farmer). In both instances, the courts found that allowing the suits to proceed in state court would not interfere with the statutory scheme established by the RLA and that the outrageous conduct alleged was not protected by the RLA or even peripherally concerned with it. Unlike Farmer and McCann, in the instant case Plaintiff has failed to identify any conduct that rises to the level of outrageousness identified in farmer or McCann. Her allegations that Defendants

interfered with the negotiation process speak directly to the manner in which the union and employer negotiated, ratified or implemented the CBA, The Court therefore finds that the outrageous conduct exception to federal preemption does not apply and DENIES Plaintiff's motion to remand on this basis.

***

STATUTORY PROVISIONS

The Railway Labor Act, 45 U.S.C. §§ 152 First, Second, Seventh, and Eleventh and 182

§152 First:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions . . .

§152 Second:

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§152 Seventh:

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act . . .

§152 Eleventh:

Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any state, any carrier or carriers as defined in this Act and a labor organization or labor

organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted –

> (a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class . . .
>
> (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments . . .

§182:

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act [45 USCS §§151-163], except section 3 thereof [45 USCS §153], shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof [45 USCS §151].

The Labor-Mangement Reporting & Disclosure Act, 29 U.S.C. §§411 et seq: 29 U.S.C. §§411(a)(4), 411(b), 413, 431(a)

§411(a)(4):

No labor organization shall limit the right of any

member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . .

§411(b):

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

§413:

Nothing contained in this title [29 USCS §§411 et seq.] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§431(a):

Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary . . .

Judiciary & Judicial Procedure Act, 28 U.S.C. §§1367, 2201 and 2202

§1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental

jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution . . .

§2201:

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.